IN THE

Supreme Court of the United States

October Term, 1979

No. 79-868

ADOLPH COORS COMPANY, a corporation,

Petitioner,

vs.

R.E. SPRIGGS CO., INC., a California corporation, and PHOEBE SPRIGGS, Successor-in-interest to the Estate of Ralph E. Spriggs, Deceased,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the Second Appellate District.

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Petitioner Adolph Coors Company ("Coors") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California for the Second Appellate District dated June 26, 1979, as modified on denial of petition for rehearing on July 23, 1979. Appendix ("App.") 98-112, 125.

The decision of the California court denies Coors a trial on liability in a private antitrust action for treble damages under the Cartwright Act (Cal. Bus. & Prof. Code §§ 16700-16758).* It reversed the trial

*California's Cartwright Act is similar, although not identical, to the Sherman Act. Federal decisions interpreting the Sherman Act are "applicable" under the Cartwright Act. *E.g., Marin County Bd. of Realtors, Inc. v. Palsson,* 16 Cal. 3d 920, 925, 120 Cal. Rptr. 1, 549 P.2d 833 (1976).

court judgment in favor of Coors and held Coors liable as a matter of law with a new trial only on the amount of damages. The California Court of Appeal gave collateral estoppel effect to two federal Court of Appeals decisions, *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) ("*Copper Liquor*"), *and Adolph Coors Co. v. FTC*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) ("*FTC*"), despite the fact that the two Courts of Appeals that rendered these decisions have expressly refused to give them collateral effect in subsequent lawsuits involving Coors, *Del Rio Distributing, Inc. v. Adolph Coors Co.*, 589 F.2d 176 (5th Cir.), *cert. denied*, 48 U.S.L.W. 3219 (U.S. Oct. 2, 1979) (No. 78-1876) ("*Del Rio*"), and *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977) ("*A & S*"). (*Copper Liquor* and *FTC* appear in the appendix at pages 27 and 5, respectively.)

Opinions Below.

The opinion of the California Court of Appeal is reported at 94 Cal. App. 3d 419, *modified on denial of rehearing*, 95 Cal. App. 3d 1028a, *as modified*, 156 Cal. Rptr. 738 (1979), and appears in the appendix. App. 98-112, 125.

The judgment and findings of fact and conclusions of law on the second trial dated April 15, 1977 and the notice of intended decision dated December 17, 1976 of the Superior Court of the State of California for the County of Los Angeles are not reported and appear in the appendix. App. 77-89.

Jurisdiction.

The judgment of the California Court of Appeal was filed on June 26, 1979. App. 98. A petition for rehearing was denied on July 23, 1979. App. 125. A petition for hearing in the Supreme Court of the State of California was denied on September 6, 1979. App. 143.

This petition for certiorari is filed under section 1257(3) of Title 28 of the United States Code within 90 days from the denial of hearing in the Supreme Court of the State of California.

This Court has jurisdiction to review the judgment of the California Court of Appeal because that court has imposed liability on Coors without a hearing on that issue and sent the case back to the trial court only to determine the amount of damages. It rejected Coors' argument that this result would be a denial of due process under the Fourteenth Amendment. This rejection was left undisturbed by the California Supreme Court. On this federal issue the decision below is final under state law and may be treated as final for purposes of review by this Court. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975); *Hudson Distributors v. Eli Lilly*, 377 U.S. 386, 389 n.4 (1964).

Questions Presented.

1. Whether offensive collateral estoppel using federal antitrust judgments from different time periods and different geographic markets to deny a defendant a trial on liability in a state antitrust action violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. Whether collateral estoppel using federal antitrust judgments that relied on the now defunct *Schwinn*

doctrine violates the decisional law of the United States including the decision of this Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), ("*Sylvania*"), *overruling United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) ("*Schwinn*").

3. Whether denying a defendant a trial on liability in a private antitrust action using a government judgment under section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) violates section 5(a) of the Clayton Act (15 U.S.C. § 16(a)).

Constitutional Provisions and Statutes.

Supremacy Clause (Art. VI, cl. 2), United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . ., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Due Process Clause (Section 1), Fourteenth Amendment, United States Constitution:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Section 5(a), Clayton Act, 15 U.S.C. § 16(a) (1976):

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

Section 5, Federal Trade Commission Act:

Section 5 of the Federal Trade Commission Act is lengthy and is therefore set forth in the appendix. App. 1.

Statement of the Case.

The fourteen year history of this case reflects the birth of the *Schwinn* doctrine, its death in *Sylvania,* and its attempted resurrection by the California Court of Appeal:

1. In *Schwinn,* this Court held that territorial limitations were *per se* violations of section 1 of the Sherman Act. 388 U.S. at 382.

2. In *FTC*, the Tenth Circuit affirmed an order of the Federal Trade Commission under section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) prospectively enjoining Coors from enforcing its territorial limitations after July 24, 1973. The court stated that it was "compelled to follow the *Schwinn per se* rule rendering Coors' territorial limitations illegal *per se*. . . ." 497 F.2d at 1187, App. 20. The Tenth Circuit expressly requested this Court to reconsider the *Schwinn per se* rule for unique products such as Coors beer:

"Although we are compelled to follow the *Schwinn per se* rule rendering Coors' territorial restrictions on resale illegal *per se*, we believe that the *per se* rule should yield to situations where a unique product requires territorial restrictions to remain in business. For example, speed of delivery, quality control of the product, refrigerated delivery, and condition of the Coors product at the time of delivery may justify restraints on trade that would be unreasonable when applied to marketing standardized products. La Fortune v. Ebie, *supra*. Perhaps the Supreme Court may see the wisdom of grafting an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason. *White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963).

497 F.2d at 1187, App. 20.

In this case Coors' petition for rehearing in the Court of Appeal and petition for hearing in the Supreme Court of California pointed out that a judgment under section 5 of the FTC Act is neither admissible nor conclusive in a private treble damages action. App. 113, 120-124, 127, 141-142.

3. In *Copper Liquor*, the Coors distributor in Brownwood, Texas "felt constrained" not to deliver Coors beer to a retailer who bought a store in Brownwood in January of 1966 and "advertised Coors at less than his own cost, using it as a 'loss leader.'" 506 F.2d at 936, 939, 950, App. 27-28, 35, 51. The Fifth Circuit affirmed in part a jury verdict against Coors under the Sherman Act, holding that Coors' territorial limitations were "ancillary to an illegal price fix-

ing scheme" and illegal *per se* under *Schwinn*, 506 F.2d at 947-48, App. 52-53.

4. At the 1976 trial in this case, the trial court bifurcated liability from damages and determined that during the relevant time period—the four years before October 18, 1965—Coors' territorial restrictions in Los Angeles County, California were reasonable and did not violate the Cartwright Act.* App. 85-88. In fact, the trial court specifically found that Coors' territorial restrictions were the only effective way to enforce quality control and availability to small retailers and to ensure compliance with extensive state regulation in California. App. 85-86, 88. The trial court also held that Coors was not collaterally estopped by *FTC, Copper Liquor* and the district court decision in *A & S*, which was thereafter reversed on appeal. App. 87. In its notice of intended decision, the trial court explained that those cases did not involve identical issues:

"The Court finds that Coors is not bound by the doctrine of collateral estoppel by reason of the decisions in *FTC*, *Copper Liquor* and *A & S*

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*This case was originally filed in the California Superior Court for the County of Los Angeles by Coors in 1965 seeking to terminate Spriggs as a distributor and to enjoin certain conduct of Spriggs. Spriggs cross-complained and a trial was held in the Los Angeles Superior Court in 1971. The court found in Coors' favor on all issues and, on the court's own motion, dismissed Spriggs' cross-claims under the Cartwright Act on the ground that the alleged restraints of commerce involved interstate commerce and therefore were within the exclusive jurisdiction of the federal court. The California Court of Appeal in *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974), held that the Superior Court had jurisdiction over the Cartwright Act claim and remanded the case for further proceedings which resulted in the second trial in the Superior Court in 1976 and the subsequent appellate proceedings from which this petition is taken.

"The doctrine of collateral estoppel cannot be used to require a court to apply inappropriate law or appellate decision. The real thrust of Spriggs' argument on collateral estoppel is to require application of the *per se* approach. As indicated above, such conclusion cannot be reached by this Court.

"*Secondly, the three cases relied upon by Spriggs did not involve a determination of completely identical issues.*

"Thirdly, to the extent that the question is open it does not appear to be appropriate to apply the doctrine *offensively* in favor of a stranger to the prior litigation, which is the result Spriggs urges."

App. 79 (emphasis added).

The non-identity of issues and injustice of applying collateral estoppel were raised in the California Court of Appeal in Coors' brief as respondent, in Coors' post hearing letter to the Court of Appeal of February 1, 1979 and in Coors' petition for rehearing and were reiterated in Coors' petition for hearing in the California Supreme Court. App. 92-95, 114-119, 126-127, 131-137, 142. The petitions for hearing and rehearing specifically cited and discussed the Due Process Clause of the Fourteenth Amendment of the United States Constitution and evidence that during the relevant time period in Los Angeles County, California territories were not imposed to carry out pricing policy. App. 113-114, 123-124, 127, 131, 142.

5. In *Sylvania,* this Court expressly overruled *Schwinn,* noting that the Tenth Circuit in *FTC* had expressly urged the Court

"to consider the need in this area for greater flexibility, *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1187 (CA10 1974)."

433 U.S. at 49 n.14.

Sylvania was cited and discussed extensively in Coors' brief as respondent in the California Court of Appeal and in its petition for hearing in the California Supreme Court. App. 91-92, 128-129, 139-141.

6. In *A & S,* the Tenth Circuit held that Coors' territorial limitations were not illegal *per se,* expressly refusing to follow its own decision in *FTC* because *Schwinn* had been overruled by *Sylvania.* 561 F.2d at 811-12.

7. In *Del Rio Distributing, Inc. v. Adolph Coors Co.,* the Fifth Circuit held that Coors' territorial limitations were not illegal *per se* and that the doctrine of collateral estoppel could not be applied to its own decision in *Copper Liquor* or to the decision of the Tenth Circuit in *FTC,* because *Schwinn* had been overruled by *Sylvania.* 589 F.2d at 179 & n.4. *Del Rio* was cited by Coors and its significance discussed in a letter to the California Court of Appeal dated March 9, 1979, enclosing a copy of the opinion. App. 96-97. *Del Rio* was again raised in Coors' petition for rehearing in the Court of Appeal and in Coors' petition for hearing in the California Supreme Court. App. 113, 119-120, 130, 137-138.

8. On Spriggs' appeal from the trial court judgment in favor of Coors after the 1976 trial on liability in this case, the California Court of Appeal* held

*Proper consideration of this petition unfortunately requires that the opinion of the California Court of Appeal not be taken at face value. For one example, the Coors policy manual

(This footnote is continued on next page)

that Coors was collaterally estopped and reversed, not for a new trial which would give Coors an opportunity to be heard on the liability issue, but with an explicit direction to the trial court to enter judgment against Coors because of the decisions in *Copper Liquor* and *FTC*.

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quoted extensively by the Court of Appeal was not "admitted to be relevant at all times" as the court states (App. 100) but was dated June 1970 (more than four years after the relevant time period) and was admitted into evidence over Coors' strong and repeated objections and evidence that it was not relevant. *E.g.*, App. 472-76. The Court of Appeal also noted the unconstitutionality of the price provisions of California's Alcoholic Beverage Control Act (App. 104), an issue that is currently before this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *cert. granted*, 48 U.S.L.W. 3217 (U.S. Oct. 2, 1979) (No. 79-97).

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Conflicts With the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

This Court has stated that due process of law requires a meaningful opportunity to be heard:

> "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."
>
> *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

Coors submits that, if collateral estoppel is to be applied so as to meet the due process standard, there must be an identity of issues as well as parties for the opportunity to be heard to be meaningful. *See, e.g.*, *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1233 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977); *Haung Tang v. Aetna Life Ins. Co.*, 523 F.2d 811, 813 (9th Cir. 1975); *Bernhard v. Bank of America*, 19 Cal. 2d 807, 811, 122 P.2d 892 (1942).

By its reversal of the second judgment that Coors was not liable to Spriggs, the California court has foreclosed Coors from any hearing on the liability issue. This denial of due process to Coors rests upon erroneous application of collateral estoppel based on two federal judgments which did not involve identical issues. This Court expressly held application of collateral estoppel based on different time periods and geographic markets to be improper in *Theatre Enter-*

prises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954):

> "The trial judge instructed, in effect, that the *Paramount* decrees alone could not support a recovery by petitioner; additional evidence was required to relate the presumed *Paramount* conspiracy to Baltimore and to the claimed damage period. The reasons for this are clear. The *Paramount* decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres; yet such a conspiracy is the nub of plaintiff's claim. The *Paramount* case involved a conspiracy found to exist as of 1945, which was enjoined no later than June 25, 1948; but the conspiracy alleged here involves a claimed damage period running from February 1949 to March 1950. Indeed, the relevancy of *Paramount* to the instant case is slight. We need not pass on respondents' contention that petitioner was entitled to no benefit at all from the earlier decrees. We merely hold that petitioner was entitled to no greater benefit than the trial judge gave it."
>
> 346 U.S. at 543-44 (footnote omitted).

Most recently this Court refused to review a Fifth Circuit decision rejecting the use of collateral estoppel based on the same two judgments against Coors to impose liability upon Coors. *Del Rio Distributing, Inc. v. Adolph Coors Co.,* 589 F.2d 176 (5th Cir.), *cert. denied,* 48 U.S.L.W. 3219 (U.S. Oct. 2, 1979). This also is in direct conflict with the decision of the California Court of Appeal.

An antitrust judgment not expressly dealing with the same time and place has no estoppel effect in a subsequent private treble damages action:

> "The findings in a government antitrust judgment or decree have an estoppel effect in a subsequent treble damage action only as to the time and place of the unlawful activity expressly dealt with in the prior decree. Essentially, this means that a finding that the defendant has violated the law in some particular geographical area during a specific period will not serve as proof that he acted unlawfully in the same manner in a different area or at another time."
>
> 16 J. von Kalinowski, Antitrust Laws and Trade Regulation § 111.02[3] at 111-25-26 (1978).

In the instant case application of collateral estoppel constitutes a denial of due process because both federal decisions relied upon (*FTC* and *Copper Liquor*) involved different conduct in a different geographical area at a different time, and did not involve clearly identical issues. In *Del Rio* and *A & S* the federal courts deciding *Copper Liquor* and *FTC* expressly refused to give collateral estoppel effect to their earlier judgments. Despite the fact that the very courts that decided *FTC* and *Copper Liquor* have subsequently refused to find Coors collaterally estopped by those decisions because of the intervening *Sylvania* decision, the California Court of Appeal has now given collateral estoppel effect to those decisions.

In *Commissioner v. Sunnen,* 333 U.S. 591 (1948), this Court rejected collateral estoppel based on such obsolete decisions:

"[A] subsequent modification of the significant facts or a change or development in the controlling legal principles may make that [earlier] determination obsolete or erroneous, at least for future purposes. . . . That principle [of collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities. . . ."
333 U.S. at 599.

Copper Liquor Involved Different Conduct in a Different State at a Different Time at a Different Level of Distribution.

The first trial in this case in 1971 determined that Spriggs was properly terminated as a Coors distributor on September 22, 1965. *See R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 656, 112 Cal. Rptr. 585 (1974). After the second trial in 1976, the trial court specifically found that

"[t]he 'relevant period' as sometimes referred to in these findings of fact is the four years preceding the filing of the cross-complaint on October 18, 1965." Finding of Fact 16, App. 86.

In *Copper Liquor* the plaintiff was a retailer named Letcher in Brownwood, Texas, who did not acquire his store until 1966:

"Letcher acquired a sole proprietorship in the Brownwood store in January of 1966. About the same time, Coors entered the Brownwood market."
506 F.2d at 939, App. 35.

Thus, *Copper Liquor* clearly involved a different time period.

Moreover, the relevant geographic market in *Copper Liquor* had been designated as "the market for beer in Brownwood, Texas." 506 F.2d at 950, App. 59. There was no question that the relevant geographic market in this case was the market for beer in Los Angeles County, California. *See, e.g.*, Findings of Fact 3, 4, 7, 13, 14, 15, Conclusions of Law 8, 10, 11, App. 83-84, 86, 88. The *Copper Liquor* judgment concerning events in Brownwood, Texas after January 1, 1966 is not relevant evidence of events in Los Angeles County, California prior to October 18, 1965.

"A judgment addressing itself to acts or practices committed in a defined geographical area is not admissible in an action in which the plaintiff is alleging unlawful activities elsewhere."
16 J. von Kalinowski, Antitrust Laws and Trade Regulation § 111.02[3] at 111-27-28 (1978).
See, e.g., State of Michigan v. Morton Salt Co., 259 F. Supp. 35, 73-75 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. State of Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967).

Finally, the plaintiff in *Copper Liquor* was a retailer who claimed that Coors refused to deliver beer to him because he was selling Coors below his own cost:

"Letcher advertised Coors at less than his own cost, using it as a 'loss leader'."
506 F.2d at 939, App. 35.

In this case not only are the plaintiffs different individuals; their status is also different. Spriggs was not a retailer as was the plaintiff in *Copper Liquor*. Spriggs was a distributor.

FTC Did Not Involve Clearly Identical Issues of Fact and There Is No Reference in FTC to Los Angeles County at Any Time Period, Relevant or Otherwise, or to Spriggs.

In *FTC*, the Court of Appeals and Federal Trade Commission both relied very heavily upon the testimony of Mr. Letcher, the plaintiff in *Copper Liquor. See* 497 F.2d at 1185, App. 15. As discussed above, Coors' dealings with Letcher clearly involved different conduct in a different state at a different time and at a different level of distribution from Spriggs.

Moreover, the *FTC* opinion affirmed an equitable decree operating prospectively from July 24, 1973. 497 F.2d at 1181-82 n.2, App. 6-8. Especially in view of *FTC*'s reliance on the testimony of the plaintiff in *Copper Liquor, supra,* it is clear that *FTC* did not involve identical conduct at an identical time and place to the conduct, time and place involved in this case. Because *FTC* did not involve identical issues of fact, application of collateral estoppel is clearly error. Indeed, the only references in *FTC* to activities of Coors in California were to the Oakland and Sacramento areas in Northern California; there is no reference to any conduct of Coors in Los Angeles County in Southern California at any time period, relevant or otherwise, and no reference to Spriggs.

Coors in *Copper Liquor* and *FTC* never had any motive or opportunity to litigate any liability to Spriggs for any conduct by Coors in Los Angeles County involving Spriggs. Thus, the Court of Appeal's decision denied due process to Coors by using cases involving different facts to impose liability without trial.

The judgment in *FTC* determined only that there was substantial evidence to support the findings of the administrative agency, and did not determine that Coors had violated the antitrust laws in Los Angeles County prior to October of 1965, an essential element of Spriggs' claim. 497 F.2d at 1184-86, App. 13-17. There appears to be a square conflict among the circuits as to whether an FTC order is a judgment under section 5(a) of the Clayton Act. *Compare, e.g., Purex Corp. v. Procter & Gamble Co.*, 453 F.2d 288, 291 (9th Cir. 1971), *cert. denied,* 405 U.S. 1065 (1972) *and Proper v. John Bene & Sons, Inc.*, 295 F. 729 (E.D.N.Y. 1923) *with Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969).

II.
The Decision Below Conflicts With the Decision of This Court in Sylvania.

In *Sylvania,* this Court expressly overruled *Schwinn.* The Court noted that the Tenth Circuit in *FTC* had

> "expressly urged [the Court] to consider the need in this area for greater flexibility. *Adolph Coors Co. v. FTC,* 497 F.2d 1178, 1187 (CA 10 1974)."
>
> 433 U.S. at 49 n.14.

Then, this Court in *Sylvania* expressly recognized that vertical restrictions promote interbrand competition by allowing the manufacturer to achieve distribution efficiencies and noted that federal and state regulations increasingly require such control. 433 U.S. at 54-55 & n.23, *citing, e.g.*, Cal. Civ. Code § 1790 *et seq.*

However, the opinion of the Court of Appeal in this case ridiculed the specific findings of the trial court that Coors' territorial restrictions were necessary and reasonable for reasons recognized by this Court in *Sylvania:*

"Eventually the trial court signed findings and conclusions. We summarize the highlights: 1. Compliance with various state laws could 'be accomplished in an effective way only by absolute designation of responsibility under territorial guidelines.' 2. Territorial limitations on distributorships were the only practicable way for insuring quality control. 3. Further, such territorial limitations and certain regulations which Coors enforced prevented distributors from servicing only the large, profitable accounts. Thus the system vindicated the public's 'right to the widest availability of Coors beer.' 4. The territorial limitations had no restraining effect on interbrand competition. 5. There was no evidence that the people of Los Angeles would have benefited from intrabrand competition and there was evidence to the contrary. 6. There was no collusion among Coors' distributors. 7. The territorial limitations were a vertical restraint but did not, per se, violate the Cartwright Act. 8. The territorial limitations were reasonable under the Cartwright Act in the light of Coors' legitimate need to insure quality control and compliance with all applicable state laws and regulations." 94 Cal. App. 3d at 425, App. 102.

Thus, the California court summarily rejected the antitrust policy of the United States articulated by this Court in *Sylvania*.

III.

The Decision Below Is Contrary to Decisions of the Federal Courts of Appeals.

The United States Court of Appeals for the Fifth Circuit, the court that decided *Copper Liquor*, recently refused to give collateral estoppel effect to that decision in *Del Rio*. The plaintiff in *Del Rio* had been a Coors distributor until termination by Coors, Del Rio sued alleging violations of the antitrust laws by Coors by means of "fixing of wholesale and retail prices and the limiting of territories where Coors beer could be resold." 589 F.2d at 177.

Following an adverse jury verdict and denial of motions for new trial or judgment n.o.v., Del Rio appealed and urged that *Copper Liquor* and *FTC* should be given collateral estoppel effect.

"Del Rio contends that adverse judgments entered against Coors in *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) serve as collateral estoppel on the issue of liability.[4] We disagree and find several bases for distinguishing those cases. One of the most obvious distinctions of *Copper Liquor* is that it was decided under the per se rule of *Schwinn* that has now been replaced by the rule of reason under *Sylvania*.

"The F.T.C. case, decided in another circuit, was based on an appeal of an F.T.C. cease and

"[4]We also find that the trial judge did not err in refusing to take judicial notice of *Adolph Coors Co. v. Federal Trade Commission,* 497 F.2d 1178 (10th Cir. 1974) or in refusing to enter into evidence the F.T.C. Complaint and the F.T.C. Cease and Desist Order."

desist order brought under § 5 of the Federal Trade Commission Act. The Federal Trade Commission had overturned the decision of an administrative law judge who had found no violation of the act. In reaching its decision on vertically imposed territorial restrictions, the Tenth Circuit was compelled to rely on law in effect at that time; the *Schwinn* per se rule.

"In light of the reliance on *Schwinn* in both *Copper Liquor* and the F.T.C. case we hold that the doctrine of collateral estoppel has no application in the instant case."

589 F.2d at 178 & n.4.

Although *Del Rio* had been decided by the Fifth Circuit and cited by Coors, the original opinion of the California Court of Appeal in this case did not even mention *Del Rio*. On denial of rehearing that court at last took note of this decision but rejected *Del Rio*'s teaching by adding a footnote stating that it was "not persuaded by that court's [the Fifth Circuit's] narrow legal view of collateral estoppel." App. 125.

As noted earlier, this Court refused to review the Fifth Circuit's rejection of the same collateral estoppel applied in this case. *Del Rio Distributors, Inc. v. Adolph Coors Co.*, 48 U.S.L.W. 3219 (U.S. Oct. 2, 1979) (78-1876).

Finally, in *A & S*, the Tenth Circuit expressly refused to follow its own decision in *FTC*, stating that its *FTC* decision was "firmly anchored" to *Schwinn*, which was overruled in *Sylvania:*

"We see no merit in this contention [for a directed verdict under *FTC*] inasmuch as it relies almost exclusively on the same predicate discussed in (1) above: 'A & S was entitled . . . to have the jury informed that the vigorously enforced territorial restrictions of Coors was a *per se* violation of the Sherman Act and that all that they had to determine was the fact and amount of damages.' [Brief of A & S, Appellant, Cross-Appellee, p. 23.] The Supreme Court decision in *Continental T.V., Inc. v. GTE Sylvania, Incorporated, supra*, disposes of this issue adversely to A & S." 561 F.2d at 811-12.

IV.
The Decision Below Conflicts With Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a).

The California Court of Appeal decision in this case holds that the FTC order in the *FTC* case is conclusive against Coors. This is not the law. Such an order is made under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which is much broader than the Clayton and Sherman Acts. It is not a judgment "under the antitrust laws" under section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), and therefore is not admissible in a private treble damages action. *See North Carolina v. Chas. Pfizer & Co.*, 537 F. 2d 67 (4th Cir.), *cert. denied*, 429 U.S. 870 (1976); *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346 (3d Cir. 1964), *aff'd on other grounds*, 381 U.S. 311 (1965); *In re Antibiotic Antritrust Action*, 333 F. Supp. 317 (S.D.N.Y. 1971); *Proper v. John Bene & Sons, Inc.*, 295 F. 729 (E.D.N.Y. 1923).

In *North Carolina v. Chas. Pfizer & Co., supra*, for example, the Fourth Circuit held that collateral estoppel did not apply to a judgment under section

5 of the FTC Act, which was "an administrative proceeding, not a judicial trial." 537 F.2d at 74. The court declared the difference between the FTC Act and the antitrust laws:

> "The issue before the Commission was whether the respondents in that proceeding were guilty of unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act which is a regulatory statute much broader in its scope than the Clayton and Sherman Acts under which the present litigation was instituted.
>
> * * *
>
> "[B]y the very terms of the Federal Trade Commission Act, proceedings under section 5 appear to be incompatible with the doctrine of collateral estoppel." 537 F.2d at 74.

Moreover, section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), provides that judgments in actions brought by the United States under the Sherman Act (but not the FTC Act) create at most a rebuttable presumption. *E.g., Purex Corp. v. Procter & Gamble Co.*, 453 F.2d 288, 291 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972) ("takes no question of fact from either court or jury . . . [n]or does it in anywise work a denial of due process of law"). *See Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 690 (1961) (Clayton Act § 5 is a "definitive legislative pronouncement that a government suit cannot be preclusive of private litigation"); *FTC v. Cement Institute*, 333 U.S. 683, 706 (1948) ("the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress").

Conclusion.

Since the petition presents a constitutional conflict on the proper scope of collateral estoppel between federal and state court application involving federal court decisions, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California for the Second Appellate District in this case.

Respectfully submitted,

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APPENDIX

Section 5(a), Federal Trade Commission Act, ch. 311, § 5, 38 stat. 719 (1914), as amended by Act of Feb. 13, 1925, ch. 229, § 2, 43 stat. 939, Act of Mar. 21, 1938, ch. 49, § 3, 52 stat. 111, Act of June 25, 1948, ch. 646, § 32(a), 62 stat. 991, Act of May 24, 1949, ch. 139, § 127, 63 stat. 107, Act of July 14, 1952, ch. 745, § 2, 66 stat. 632, Act of Aug. 23, 1958, Pub. L. 85-726, Title XIV, § 1411, 72 stat. 809, Act of Sept. 2, 1958, Pub. L. 85-909, § 3, 72 stat. 1750 (current version at 15 U.S.C. § 45(a) (Supp. I 1977)).

(a) *Declaration of unlawfulness; power to prohibit unfair practices.*

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bear the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons,

partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Spriggs' Exhibit 80.

COORS PRICING POLICY

Regardless of geographic location or quantities of purchases, all Distributors pay the same price F.O.B., Golden, Colorado.

The Adolph Coors Company requires certain things of its wholesalers, including but not limited to:

1. Refrigerated Warehouses.
2. Adequate, well-qualified employees in clean uniforms.
3. Necessary insulated, clean trucks.
4. Good community image and relationship.
5. Excellent service to all retailers.

In order to maintain a successful wholesale or retail business, pricing integrity is essential. Pricing integrity will result in an adequate and equitable profit to both Distributor and retailer and is fair to the ultimate consumer.

It is the policy of the Adolph Coors Company to suggest, if it so chooses, to either the wholesaler or retailer level, suggested minimum pricing. We reserve the right to further that policy by simply refusing to deal with anyone who doesn't adhere to said policy.

The Adolph Coors Company and its agents must only state the policy. They cannot make agreements, threaten, coerce, or intimidate wholesalers or retailers in any manner. They can enforce the policy only by reserving the right to refuse to deal with those who don't adhere to the suggested prices. Rev. 6-70

Opinion.

Adolph Coors Company, Petitioner-Appellant, v. Federal Trade Commission, Respondent-Appellee. No. 73-1567.

United States Court of Appeals, Tenth Circuit.

Filed: June 4, 1974.

Leo N. Bradley, Golden, Colo. (Earl K. Madsen, Golden, Colo., on the brief), for petitioner-appellant.

Robert E. Duncan, Washington, D. C. (Calvin J. Collier, Gen. Counsel, Gerald Harwood, Acting Asst. Gen. Counsel, W. Baldwin Ogden, Washington, D. C., on the brief), for respondent-appellee.

Before HOLLOWAY and BARRETT, Circuit Judges, and DURFEE,* Judge Court of Claims.

BARRETT, Circuit Judge.

Adolph Coors Company appeals an Order to Cease and Desist issued by the Federal Trade Commission. The FTC filed a complaint alleging that Coors was engaged in anticompetitive practices in violation of Section 5 of the Federal Trade Commission Act.[1] An Initial Decision was issued by the Administrative Law Judge after hearings were conducted in Denver extending over a period of thirty days. The Law Judge found that Coors had not violated the Act. He recommended that the complaint be dismissed. The FTC appealed the Initial Decision to the five-member Federal Trade Commission. The Commission substituted its findings for those of the Law Judge and found, as

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*Honorable James R. Durfee, sitting by designation.

[1]Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45, provides in part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, ... from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

a matter of law, that Coors had violated Section 5 of the Act.[2]

Adolph Coors Company, a Colorado corporation, is engaged in brewing, distribution and sale of beer, using the trade name of "Coors". Coors has one brewery in Golden, Colorado, and distributes its beer in an eleven-state area. The beer is sold to the distributors

[2]The Commissioners ordered that Coors cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, maintaining, establishing or setting of the prices at which distributors sell Coors beer to retailers or the prices at which retailers sell Coors beer to consumers.

2. Publishing, disseminating or providing any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any distributor to any retailer or any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any retailer to any consumer. * * *

3. Publishing, disseminating or providing to any distributor or any retailer any information or suggestions concerning what Coors may believe to be an appropriate or proper mark-up or profit for Coors beer when the distributor sells to the retailer or when the retailer sells to the consumer or a mark-up or profit below which the distributor or retailer is advised not to sell Coors beer. * * *

4. Refusing to sell beer to any Coors distributor or terminating or threatening to terminate any Coors distributor because:

A. the distributor has in the past or might in the future sell Coors beer at prices, mark-ups, or profits different from those approved or recommended by respondent:

B. one or more of the distributor's customers sold Coors beer or advertised Coors beer for sale at prices, markups, or profits different from those approved or recommended by respondent:

C. the Coors distributor sold Coors beer to another distributor or to a retailer whose business is located outside of the territory granted to the distributor; or

D. the Coors distributor distributes, has distributed, or proposes to distribute in the future the product of another brewer.

5. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct

who in turn sell to retailers. While Coors is the fourth largest beer brewer in the United States, it alone among the nation's some 70 brewers is a "shipping" brewery, i.e., Coors ships all of the beer brewed at its single "regional" brewing plant at Golden, Colorado, F.O.B. to the various distributors in Arizona, California, Colorado, Idaho, Kansas, Nevada, New Mexico, Oklahoma, Texas (some counties only), Utah and Wyoming. In

to fix, establish, limit or restrict the territory in which or the persons to whom a distributor may sell Coors beer.

* * *

6. Allocating Coors beers among its distributors in times of beer shortage at the Coors brewery, by any means other than by allocating shares to distributors equal to their proportionate purchases of Coors beers from the brewery during the last three months before the allocation or when the distributor has not been in business for more than a year as a Coors distributor, on some other equitable basis.

7. Refusing to deliver all of a distributor's order because the distributor has made sales to customers outside of the territory granted the distributor or because the distributor or the distributor's customer is selling Coors beer at prices, markups or profits lower than those approved by respondent.

8. Prohibiting its distributors from selling for central warehouse delivery; provided, however, that respondent can establish refrigeration standards for the central warehouse which are substantially similar to those established for distributors and can require its distributors to be responsible, directly or indirectly, for maintenance of such refrigeration standards and for rotation of Coors beer in the central warehouse and at the retail delivery locations where the beer is redelivered from the central warehouse, if respondent changes its container dating system so that the retailer and the consumer will recognize the date without reference to a code or measuring stick.

8. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct with its distributors which has as its purpose or effect requiring that retailers serve Coors draught beer as their only light-colored draught beer.

10. Entering into, maintaining, or enforcing any contract, agreement or understanding, or taking any action or course of conduct with any of its distributors which has as its purpose or effect the requirement that the distributor eliminate, or refrain

(This footnote is continued on next page)

1971 the average barrel of Coors beer traveled 961 miles to its market place.

The beer is made by the aseptic brewing process which requires refrigerated marketing. It is uncontroverted that Coors beer is substantially more expensive than any other beer consumed in the United States, and yet because of its popularity, Coors has climbed from the 49th largest brewery in 1948 to its number 4 position today. Coors maintains market leadership in total sales agasint all competitors except in its territory served in Texas. Because of the delicacy of the

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from obtaining and handling rival brands of beer in order to become or remain a Coors distributor.

11. Hindering, suppressing or eliminating competition or attempting to hinder, suppress or eliminate competition between or among distributors or between or among retailers handling Coors beer.

12. Cancelling any distributor agreement unless and until the respondent has pursued the following procedure:

A. Cancellation With Cause

(a) Respondent has given the distributor sixty days' notice of respondent's intention to cancel its agreement with the distributor; . . .

B. Cancellation Without Cause

(a) Respondent has given the distributor one hundred and eighty days' notice of respondent's intention to cancel its agreement with the distributor;

. . . .

13. IT IS FURTHER ORDERED that respondent, within three (3) months from the date this Order becomes final, shall provide for arbitration, in the city in which a distributor resides, by an independent and neutral arbitrator, to determine in the case of any announced termination, and upon the request of a distributor, whether or not said termination is made in good faith (in the case of termination without cause) or whether or not said termination is made in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise (in the case of termination with cause). * * * *

/s/ Charles A. Tobin
Secretary

ISSUED: July 24, 1973

product, it is essential that the refrigeration controls and expeditious marketing techniques be strictly monitored. Once the beer is delivered to the distributors, this obligation is assumed by them under an agreement with Coors. It is the distributor who is required to protect the "integrity" of the Coors beer quality, by guarding against a retailer's failure to rotate the beer, and failure to insure proper refrigerated storage. Coors beer retained over 90 days must be destroyed.

Coors has 35 area representatives to help market the product. Each representative is assigned certain distributors to work with and to see that Coors' Policy Manual is followed. The price Coors charges to its distributors is set by Coors. Coors suggests to its distributors and retailers the price at which to sell its beer.

Each distributor is assigned a territory in which to market Coors' products. Coors may reduce the territory or add distributors to a particular territory. There are 166 independent distributors and one wholly owned subsidiary company.

In 1964 Coors eliminated sales to central warehouse accounts. Central warehouse accounts are either retailers such as large chain supermarkets who buy for redelivery to their own outlets, or independents who purchase for redelivery to nonaffiliated retail outlets or retailer warehouses.

Coors favors draught accounts. It has a draught policy in which tavern owners are given 30 days to discontinue handling other brands of light draught beer. If the owner-retailer continues to sell another brand of light draught beer, Coors discontinues its supply of light draught beer to the tavern.

The contract between Coors and the distributors enables Coors to cancel its contract for any breach by the distributor, with a five-day notice. Either Coors or the distributor may cancel the contract without cause with a 30-day notice.

Coors contends that: (1) it did not engage in wholesale or retail price fixing; (2) its vertically imposed territories are reasonable and legal; (3) it has no policy of requiring exclusive draught accounts; (4) it has the right to protect its quality product and not distribute its beer through central warehousing; (5) its contract termination rights are reasonable and legal; (6) the provisions of the Commission's Order are not supported by substantial evidence, are not reasonable, and are in conflict with important public policies; (7) the FTC internal procedures have prejudiced its right to a fair hearing; and (8) this court must exercise its power and set aside the Commissioner's Order.

I.

Coors contends that it did not engage in price fixing agreements with its distributors. Its practices are set out in the Coors Policy Manual which states as follows:

> In order to maintain a successful wholesale or retail business, pricing integrity is essential. Pricing integrity will result in an adequate and equitable profit to both Distributor and retailer and is fair to the ultimate consumer.
>
> It is the policy of the Adolph Coors Company to suggest, if it so chooses, to either the wholesaler or retailer level, suggested minimum pricing. We reserve the right to further that policy by simply refusing to deal with anyone who doesn't adhere to said policy.
>
> The Adolph Coors Company and its agents must only state the policy. They cannot make agreements, threaten, coerce, or intimidate wholesalers or retailers in any manner. They can enforce the policy only by reserving the right to refuse to deal with those who don't adhere to the suggested prices.

Coors' sales manager, Harvey Gorman, testified that the product is controlled by agreeing individually with each distributor. This policy is enforced by a provision in the contract between Coors and the distributor enabling Coors to terminate a distributorship in 30 days without cause. Since there are about 7,000 applicants for distributorships, any distributor who does not conform to Coors' pricing policies could readily be replaced. Coors' area representatives constantly obtain wholesale price information and send the information to the home office in Golden. The area representatives also resolve any conflicts between the prices proposed by a distributor and those suggested by Coors.

John Hemphill, a former Coors distributor, testified that he would only go so far in making a request to use his own prices, knowing that Coors could terminate him in 30 days. He also testified that a Coors' area representative told him that the best thing for him to do is not to be a distributor if he could not agree to Coors' policies on pricing and territories. The Law Judge had questioned Hemphill's credibility because of a suit he has pending against Coors, but the Commissioners rejected this fact as bearing on the issue of credibility.

Jay Wagnon, a Coors' distributor, testified that Coors insisted on controlling distributor price increases and that when he refused to adopt wholesale prices suggested by the Coors' area representative he was summoned to Golden and requested to change his prices. He stated that Coors' personnel told him to bring his prices in line with Coors' recommendations or they could put another distributor in his area. He testified that he was afraid; that he had been threatened; and that he therefore conformed to the suggested prices. The Law Judge did not find Wagnon's testimony credible. The Commissioners, on the other hand, found that his testimony was credible.

Jay Thurman, a former distributor, testified that he was given pricing sheets by the area representative which were to be followed. He was told that if the prices were changed, it would go through Mr. Straight, a Coors official, who, in turn, would determine if the changes were justified.

Peter Tinetti, a former distributor, testified that Coors sent him the prices at which to sell Coors beer.

The area representatives submitted reports to the Golden headquarters about agreements or understandings they had made with distributors on wholesale prices.

Price fixing is illegal *per se* under the Sherman Antitrust Act. 15 U.S.C.A. § 1; Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4-5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 218, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Price fixing is also illegal *per se* under Section 5 of the Federal Trade Commission Act. 15 U.S.C.A. § 45. Prices are fixed when they

are agreed upon. United States v. Masonite Corporation, 316 U.S. 265, 276, 62 S.Ct. 1070, 86 L.Ed. 1461 (1942). The agreement to fix prices renders the conspiracy illegal. The agreement may be inferred or implied from the acts and conduct of the parties, as well as from surrounding circumstances. Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F.Supp. 945 (S.D.Tex. 1972); National Macaroni Manufacturers Association v. Federal Trade Commission, 345 F.2d 421 (7th Cir. 1965).

> . . . . the test . . . . is whether the agreement, or conduct, interfers with the freedom of sellers or traders in such a manner as to prohibit or restrain their ability to sell in accordance with their own judgment, and not what particular effect the agreement or conduct, has on the actual prices. 339 F.Supp. 945 at 952.

The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *National Macaroni, supra.* If the inference is supported

by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni, supra.*

The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 138 U.S. App.D.C. 152, 425 F.2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. OKC Corp. v. Federal Trade Commission, 455 F.2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra.*

There is substantial evidence from the record as a whole to support the Commission's findings of price fixing agreements between Coors and its distributors.

Coors also challenges the Commission's finding that Coors has a resale price maintenance program and that it has in some cases secured adherence to its suggested retail prices by unlawful means. There is substantial evidence to support the Commission's finding.

Coors' policy is to establish pricing integrity which means that a certain profit is allowed on each level of resale. Pricing integrity is not possible with price discounting. Coors implements pricing integrity by refusing to deal with anyone not adhering to its price suggestions. A Coors' area representative threatened to refuse sales to an offending retailer unless he would adhere to the prices suggested by Coors. Coors used its distributors to secure retailers' adherence to suggested minimum prices. One area representative reported that a retailer was cut off by a distributor because the retailer was advertising Coors beer at cut prices. Another area representative reported that a distributor planned to take appropriate action against a retailer who refused to sell at suggested prices. A distributor reported that Coors beer was not delivered to a retailer who cut prices. An area representative reported that action would be taken against a retailer who refused to raise his prices to a profit level.

Mr. Letcher, a retailer, testified that he was selling Coors at special weekend prices and that he was warned by the Coors distributor to discontinue the practice. Letcher refused to cooperate and the distributor terminated deliveries to his store. The distributor told Letcher that deliveries would be received if he would agree not to discount the beer, and that Letcher might lose the retail account if he continued to discount the beer. Letcher was also told by the distributor that Coors does not tolerate price cutting. Letcher sold his business. The distributor resumed deliveries to the new owners who agreed not to discount the beer. The distributor did not act independently in cutting off Letcher as Coors suggests, but cut him off in accordance with Coors' pricing policies.

United States Supreme Court decisions hold that if a manufacturer advances beyond a simple refusal to deal and takes affirmative action to secure compliance with its prices, a combination in violation of Section 1 of the Sherman Antitrust Act and Section

5 of the Federal Trade Commission Act occurs. United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); Federal Trade Commission v. Beech-Nut Packing Company, 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307 (1922). Any trespass on the independence of a reseller or wholesaler to set his own prices is a violation of the Sherman Act. *Pearl Brewing Co., supra.* A seller may refuse to deal with one failing to adhere to its specified prices, United States v. Colgate & Company, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), but where a concerted effort is used to interfere with the distributors' pricing independence and to compel them to adhere to suggested prices, there is a violation of the Sherman Antitrust Act. A manufacturer may choose those to whom it will sell to as long as its conduct has no monopolistic purposes. Colorado Pump & Supply Company v. Febco, Incorporated, 472 F.2d 637 (10th Cir. 1973), cert. denied 411 U.S. 987, 93 S.Ct. 2274, 36 L.Ed.2d 965 (1973).

The Commission found that:

> . . . . [Coors] has pursued a policy of fixing, controlling and maintaining prices at which Coors beer is sold at both the wholesale and retail level, that in furtherance of this policy it has engaged in various acts and practices such as: suggested resale prices to both distributors and retailers, checking prices at which distributors and retailers sell Coors beer, advising distributors and retailers that it is contrary to Coors pricing policy for them to deviate from prices approved by respondent, threatening to terminate distributorships and threatening to force distributors to sell their businesses for refusing to adhere to suggested retail prices, entering into agreements and understandings with distributors as to the wholesale prices which the distributors will charge for Coors beer, joining with distributors in attempting to coerce retailers to refrain from selling Coors beer at prices below those approved by respondent, encouraging distributors to prevent retail price cutting by refusing to deliver Coors beer to price cutters, or to reduce the amount of beer delivered, and entering into agreements and understandings with retailers as to the retail prices or range of prices at which such retailers will sell Coors beer.

There is substantial evidence in the record to support the Commission's findings.

II.

Coors alleges that its vertically imposed territories are reasonable and legal. The Commission held that Coors vigorously enforces its territorial restrictions and that it has engaged in unlawful price fixing which is:

> . . . . [s]trong grounds for presuming that the most injurious effects of vertical territorial division may be operative, and, therefore, for holding the entire arrangement of territories with price fixing illegal per se.

The Coors' distributor contract provides, in part, as follows:

> While this agreement is in effect the Distributor will conduct the business of wholesale distribution of Coors Beer in the above territory only. . . .

In United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), the

United States brought an antitrust action against Arnold, Schwinn & Co., an association of Schwinn distributors and a Schwinn distributor, seeking a declaratory judgment to invalidate the distribution franchising system of its products. Schwinn bicycles are shipped directly to franchised retailers who agree to sell only to ultimate consumers. Schwinn also distributed its bicycles to franchised distributors who agreed not to resell to anyone outside their assigned territories. The Court held that:

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. White Motor, [Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963)]; Dr. Miles [Medical Co. v. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911)]. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.
> 388 U.S. at 379.

The rule of law in *Schwinn* is clear and unequivocal.

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act. 388 U.S. at 382.

See Federal Trade Commission v. Sperry & Hutchinson Co., 405 U.S. 233, 247, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972); United States v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); Williams v. Independent News Co., Inc., 485 F.2d 1099 (3rd Cir. 1973); Warriner Hermetics, Inc. v. Copeland Refrigeration Corporation, 463 F.2d 1002 (5th Cir. 1972), cert. denied 409 U.S. 1086, 93 S.Ct. 688, 34 L.Ed.2d 673 (1972); Beverage Distributors, Inc. v. Olympic Brewing Co., 440 F.2d 21 (9th Cir. 1971), cert. denied 403 U.S. 906, 91 S.Ct. 2209, 29 L.Ed.2d 682 (1971); Fontana Aviation, Inc. v. Beech Aircraft Corporation, 432 F.2d 1080 (7th Cir. 1970), cert. denied 401 U.S. 923, 91 S.Ct. 872, 27 L.Ed.2d 826 (1971). *Cf.* Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 196 Ct.Cl. 35 (1971); Tripoli Company v. Wella Corporation, 425 F.2d 932 (3rd Cir. 1970), cert. denied 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62 (1970); LaFortune v. Ebie, 26 Cal.App. 3d 72, 102 Cal.Rptr. 588 (Cal.Ct.App.1972).

Coors, a manufacturer, enters into an agreement with its distributors to distribute Coors beer in the assigned territory only. Coors maintains that the territorial restrictions are necessary to retain the quality and proper refrigerated handling of its beer, and that the territorial restrictions are legal. However, since Coors parts with title and risk to the product when it sells and delivers the beer to distributors, and thus has parted with dominion over the product, its further effort to restrict the territories or persons to whom the product can be transferred is a *per se* violation of Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Coors may still condition its sales to distributors and others upon main-

tenance of procedures necessary to control the quality of the product.

Although we are compelled to follow the *Schwinn per se* rule rendering Coors' territorial restrictions on resale illegal *per se*, we believe that the *per se* rule should yield to situations where a unique product requires territorial restrictions to remain in business. For example, speed of delivery, quality control of the product, refrigerated delivery, and condition of the Coors product at the time of delivery may justify restraints on trade that would be unreasonable when applied to marketing standardized products. La Fortune v. Ebie, *supra*. Perhaps the Supreme Court may see the wisdom of grafting an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason. White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963).

The dissenters in *Schwinn* contended that the new *per se* rule cannot be justified, automatically invalidating vertical restraints in a distribution system based on sales to wholesalers and retailers.

> . . . the Court has, *sua sponte* created a bluntly indiscriminate and destructive weapon which can be used to dismantle a vast variety of distributional systems—competitive and anticompetitive, reasonable and unreasonable.
> 388 U.S. at 394.

Thus we are foreclosed from considering the reasonableness of the restriction or its business justification. We are cognizant of the unpredictability which is created in relationship to the Coors operation.

III.

Coors contends that it has no policy of requiring exclusive draught accounts. The Commission found that Coors combined with its distributors in the practice of encouraging and coercing retailers to sell Coors draught beer to the exclusion of light draught beer competitors in violation of Section 5 of the Federal Trade Commission Act.

Mr. Coors testified that exclusive draught accounts were desirable. Several distributors testified that the purpose of obtaining exclusive draught accounts is to encourage draught customers to buy beer to take home. To implement the policy, Coors threatened to terminate a retailer's supply of Coors draught beer unless he eliminated competitive draught beers within 30 days. Coors' distributors did, in fact, take out their Coors draught beer if the retailer did not comply with the policy.

Agreements foreclosing a competitor's products are unlawful. Federal Trade Commission v. Brown Shoe Co., Inc., 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966); Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457, 668, 61 S.Ct. 703, 85 L.Ed. 949 (1941); Standard Fashion Company v. Magrane-Houston Company, 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653 (1922). The policy of pursuing an exclusive draught policy violates Section 5 of the Federal Trade Commission Act. There is substantial evidence in the record to support the Commission's finding.

IV.

Coors asserts that it has the right to protect its quality product and not distribute its beer through central warehousing. The Commission held that Coors'

prohibition of central warehouse sales, or a requirement that wholesale prices to those accounts equal those to other retailers is a substantial restraint on the capacity of the distributor to resell to whomever he chooses and threatens the same anticompetitive results as other illegal restraints on alienation. Therefore, the Commission found that the practices are unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

The central warehouse method of distribution involves purchase by the warehouser of beer from the brewer or the distributor. The beer is delivered by the retailer to its outlets. This method of distribution could cut the price of the beer to the retailer and consumer. Coors eliminated sales to central warehouse accounts in 1964. The distributors viewed central warehousing as a threat to the integrity of their territorial restrictions. Coors alleges that sales to central warehousers affects the quality of its beer because of poor procedures used by the warehousers.

The Order imposed by the FTC does not prevent Coors' distributors from conditioning its sales to central warehouse accounts on the maintenance of procedures necessary to the quality control of its products. The Order only enjoins Coors from requiring its distributors from refusing to sell to central warehouse accounts. The restriction by Coors, limiting those with whom the distributors may deal, amounts to a restriction on resale and violates the mandates of *Schwinn* and the Federal Trade Commission Act. There is substantial evidence in the record to support the FTC's finding.

V.

Coors alleges that its contract termination rights are reasonable and legal and that its conduct in the rare instances of its use has been proper and legal in every respect. The Commission held that:

> Whether or not any actual terminations of Coors distributors, or sales forced by threat of termination can be ascribed entirely, solely and unambiguously to the failure of the terminated or coerced distributor to participate in an antitrust violation, it is abundantly clear from the record in this case that Coors representatives have used the explicit or implicit threat or speedy termination is often successful in efforts to force the acquiescence of its distributors in anti-competitive behavior.

The Coors distributor contract provides in part as follows:

> This agreement and any supplements now or hereafter effective (whether fixing prices and terms to the Distributor, or otherwise) may be cancelled in entirety at any time by the Company for any breach by the Distributor on five (5) days' written notice to the Distributor. This agreement and such supplements may be cancelled in entirety by either party without cause upon the giving of notice to that effect to the other party, in which event termination shall become effective thirty (30) days after delivery or the mailing of the written notice of cancellation, whichever first occurs. * * *

The Commission held that Coors used the threat of speedy termination to force its distributors into anticompetitive behavior. There is substantial evidence in the record to support the Commission's holding.

Coors has the right to terminate distributors according to the contract provisions which the distributors have agreed to. Bushie v. Stenocord Corporation, 460 F.2d 116 (9th Cir. 1972). However, it may not use the contract termination provisions to force its distributors into anticompetitive behavior.

The Law Judge was correct in stating that the termination provisions of Coors and its distributors, based upon their contractual obligations, are a matter of private contract and are not subject to interference by third parties. The termination provisions are reasonable but may not be used by Coors to force any unlawful conduct. Therefore the Commission's attempt to rewrite Coors' contract termination provisions in paragraphs 12 and 13 of its Order must be set aside. The contract termination provisions do not violate Section 5 of the Federal Trade Commission Act.

VI.

Coors alleges that FTC internal procedures have prejudiced its right to a fair and impartial hearing. Coors asserts that Mr. Steinitz, a staff attorney of the FTC, performed investigative and prosecuting functions in preparing the case against Coors, and that he also participated in the review of the case as attorney-advisor to Commissioner Paul Rand Dixon in violation of 5 U.S.C.A § 554(d) and 16 CFR 4.7(a).

Coors' contention was not raised in the administrative proceeding and therefore is not properly before this court. Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed.2d 370 (1958). In any event, Coors' contention has no merit because Mr. Steinitz, in an affidavit in the record, states that upon leaving FTC's staff he did not discuss

the merits of the Coors case with any of the Commissioners or the Commission's trial staff. There was no error.

VII.

Coors alleges that the provisions of the Commission's Order are not supported by substantial evidence, are not reasonable, are in conflict with important public policies, and must be rejected. It alleges that Paragraphs 4C, 5 and 7, if adopted, would force it to abandon its right to choose those it will authorize to serve as its distributors in its marketing area, eliminating its ability to obtain required market penetration for its survival. Coors states that Paragraph 6, a formula devised by the FTC for beer rationing, is too simplistic to work effectively for Coors.

The Order by the Commission is reasonably related to the violations by Coors. The Commission is vested with wide discretion in its choice of remedy to cope with unlawful practices, and its choice will not be disturbed unless it has no reasonable relation to the unlawful practices found. Federal Trade Commission v. Mandel Brothers, Inc., 359 U.S. 385, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946). Once the Government has borne its burden of establishing violations of the law, all doubts about the remedy are resolved in its favor. United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961).

We hold that paragraphs 1 through 11 of the FTC's Order are enforced; paragraphs 12 and 13 of the FTC's Order are set aside.

HOLLOWAY, Circuit Judge (concurring in part and dissenting in part):

I fully concur in the well-reasoned opinion of the court in upholding paragraphs 1 through 11 of the Commission's order and disagree only as to the setting aside of paragraphs 12 and 13.

It is true that paragraphs 12 and 13 require a substantial change in the contract provisions on termination of distributorships. However, the Commission has found that it is abundantly clear the Coors representatives have used the explicit or implicit threat of speedy termination in efforts to force acquiescence of its distributors in anticompetitive behavior. We are agreed that there is substantial evidence in the record to support the finding.

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices in this area of trade and commerce. See Siegel Co. v. FTC, 327 U.S. 608, 611, 66 S.Ct. 758, 90 L.Ed. 888. The courts interfere only where there is no reasonable relation between the remedy and the violation. Atlantic Refining Co. v. FTC, 381 U.S. 357, 377, 85 S.Ct. 1498, 14 L.Ed.2d 443. And orders affecting contractual relationships have been upheld where unlawful practices involved similar subtle pressures and threats of termination of dealers' leases. Id. at 374-375.

On this record and the findings made I would uphold as reasonable the Commission's choice of a remedy to cope with the unlawful practices.

Opinion.

Copper Liquor, Inc., and Harold Letcher (Robert Earl Basham, Jr., H. A. Anthony and Willis Ray Loving, as the personal representative of Appellee,

Harold Letcher, substituted in the place and stead of Appellee, Harold Letcher, Deceased), Plaintiffs-Appellees, v. Adolph Coors Company, Defendant-Appellant. No. 73-3913.

United States Court of Appeals, Fifth Circuit.

Jan. 17, 1975.

Rehearing and Rehearing En Banc Denied March 17, 1975. See 509 F.2d 758.

Leo N. Bradley, Golden, Colo., William B. Browder, Jr., Midland, Tex., for defendant-appellant.

Vann Culp, Midland, Tex., James R. Warncke, San Antonio, Tex., for plaintiffs-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, WISDOM and GEE, Circuit Judges.

WISDOM, Circuit Judge:

On May 14, 1970, the plaintiff, Harold Letcher,[1] a retail liquor-store owner in Brownwood, Texas, brought this action under the Sherman Anti-Trust Act of 1890, §§ 1 and 2,[2] against the Adolph Coors

[1]Mr. Letcher died while the appeal was pending in this Court. The cause of action survives his death. Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 4 Cir. 1942, 128 F.2d 645. A motion for substitution of his executors was allowed. The retail liquor store of which he became sole proprietor in January of 1966 experienced several changes treated fully in this opinion.

[2]15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or

(This footnote is continued on next page)

Company. Letcher contended that Coleman Distributing Company, a Coors distributor, had refused to deliver Coors beer to him. At trial Letcher abandoned the claim under section two of the Sherman Act, and the court submitted the case to the jury only under section one. The jury found liability and assessed damages of $101,011. The trial court trebled the damages to $303,033, as it was required to do under 15 U.S.C. § 15,[3] and awarded attorneys' fees of $75,000.

The plaintiff's theory under section one of the Sherman Act is based on two interrelated contentions. First, Letcher contends that Coors conspired or combined with its distributors to fix the retail price of its beer and caused its distributor, servicing the plaintiff's retail liquor store, to discontinue the supply of Coors beer to the plaintiff when he sold below the suggested retail price and declined to give assurances that he would not do so in the future. Second, Letcher contends that Coors conspired or combined with its distributors to create and enforce exclusive territories within which each distributor was to conduct his business, making it impossible for the plaintiff to obtain a supply of

persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[3]15 U.S.C. § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Coors beer from another distributor once his original supply had been cut off. We hold that the plaintiff adduced sufficient evidence to show a violation of section one of the Sherman Act, but we remand the case for further proceedings (1) to determine whether the violation caused Letcher injury and, (2) if so, to determine damages in the light of the principles stated in this opinion.

I.

The Adolph Coors Company, founded in 1873, an entirely family-owned business, is the fourth largest brewer of beer in the United States. All its brewing is done at a single plant at Golden, Colorado, a small town in a little valley in the foothills of the Rocky Mountains. The plant is the largest single brewery in the world. Coors is a "regional" brewer that markets its beer only in ten western states and half of Texas, unlike its three larger competitors, which have established "branch" breweries at various locations throughout the country and sell in all fifty states. Coors restricted its market area, in large part because of the process by which its beer is brewed. Coors is expanding its capacity at a rate of ten percent a year, all of it internally financed.

William Coors, the chief executive officer of the firm, testified as to the care taken in the brewing technique. The water used is nearby Rocky Mountain spring water that is remarkably free of microorganisms and organic matter. The flavoring agent for beer is hops; Coors imports a special German hop. There is no accounting for taste. But it is undisputed that this German hop imparts a flavor to Coors beer that, as Coor's witnesses testified, is "very characteristic

and very delicate". The firm has developed its own variety of brewing barley, and maintains a staff of about fifty persons, some of whom are geneticists and agronomists, to supervise the production of the barley crop. To impart lightness to the beer, Coors dilutes the barley ingredients in the brew with a form of neutral starch obtained from a short-grain variety of rice of Asiatic origin that is twice as expensive as other varieties of rice available for that purpose. Mr. Coors concluded, "Coors beer is by a wide margin the most expensive beer made from the standpoint of the raw materials and the processing." According to his testimony, the brewing process at Coors takes about eighty days, as compared with forty days at the breweries of one of its three largest national competitors and twenty days at the breweries of another of the three national competitors.

Mr. Coors testified that Coors beer is brewed in an "aseptic" process, rather than by a technique employing pasteurization. In this process the firm employs refrigeration and rotation of stock so that beer past a certain age is removed from the marketplace. Special refrigerated railroad cars or other refrigerated vehicles are used in transporting the beer from Golden to the distributors, who must maintain the Coors beer in refrigerated warehouses and vehicles until it is delivered to the retailers. The retailers, in turn, are urged to keep it refrigerated until the ultimate consumer purchases it. Coors, its distributors, and its outlets maintain substantial efforts to reduce the exposure of the beer to light, heat, and agitation, for these factors have an adverse effect upon the flavor of the beer. Distributors have heavy responsibilities to maintain Coors's standards in this regard.

Coors limits its market to the states of California, Arizona, Nevada, Utah, Idaho, Wyoming, Colorado, New Mexico, Kansas, and Oklahoma, and to roughly the northern half of the state of Texas. This is about the same market Coors has enjoyed since the 1930's, after the repeal of Prohibition. Expansion of the firm is directed more toward increasing market penetration within areas already serviced than toward expanding the geographical area serviced. This policy is dictated by the centralization of Coors's brewing facilities. For example, the average shipment to the California market for Coors is thirteen hundred miles, while the average shipment of Budweiser in California is around one hundred miles. Coors beer is sold to the distributors at one price, f. o. b. Golden. Since the distributor pays the freight, the cost of shipment works a substantial practical limitation on the expansion of the market area. Moreover, Coors has experienced for many years a shortage of production capacity to meet the existing demand within the geographical area currently serviced by its distributors. Mr. Coors characterized market penetration within that area as crucial to the firm's survival. Since the beer is sold only in a limited area, a large amount of advertising expense is saved, so that per barrel the firm spends on advertising only a quarter of what its major competitors spend. In part, this saving is made possible, as Professor Cundiff, Coors's marketing expert, testified, because Coors beer enjoys a high degree of customer loyalty and brand identification unusual, if not unique, in the beer market in the United States; and the savings, of course, help offset the transportation disadvantage.

Coors enters into distributorship agreements for certain geographical territory granting to the distributor

a "non-assignable, non-exclusive, personal right to engage in the wholesale distribution of the company's beer products" within the described territory. The distributor promises to conduct his wholesale distribution exclusively within the prescribed territory. The agreement provides that either party may cancel the agreement without cause with thirty days' written notice, and that Coors may cancel the agreement "for any breach by the distributor" upon five days' written notice. Coors has such agreements with 160 distributors within its market area. A Coors distributorship is highly sought after; the company has about 7,000 applications on file. Mr. Coors testified that without the territorial restrictions imposed in the agreements, it would be difficult if not impossible to maintain the efficiency of the distribution system. Although one entering into a distribution agreement with Coors pays nothing for the right granted him, the distributor must make a substantial capital expenditure to establish refrigerated facilities for warehouses, trucks, and related equipment. Mr. Coors stated that unless the distributor could be assured that he would not be confronted with competition from another Coors distributor within his territory —assured that there would be no intrabrand competition—the distributor would be unwilling to make the necessary capital expenditure, and lending institutions would be unwilling to extend credit to him. Aside from difficulties intrabrand competition among distributors would create in attracting capital, Mr. Coors indicated that such competition, if permitted, would eventually erode the firm's market penetration. In the short run, so he said. intrabrand competition among distributors would primarily manifest itself in wholesale price competition and perhaps lower retail prices in competition

in service. However, as time passed, the weaker of those who had been able to make the capital expenditure to undertake a non-exclusive distributorship would be eliminated from the competition, the "price" of competition would decline, and there would be a rise in the level of wholesale prices. In the long run, the effect of such competition on the smaller retail accounts would, he thought, be highly undesirable. Because there is almost always a shortage of Coors for the market area, the company allocates the supply with two primary goals: maintaining retail price stability and servicing the maximum number of retail outlets within the area with a supply as dependable as possible, so that consumer exposure and prompt stock rotation are promoted. Coors employs a computer to help balance its production capability with the inventory requirements of the distributors.

Mr. Coors and Professor Cundiff implied that in the earlier phrases of intrabrand competition, distributors would concentrate their efforts on the larger accounts to the detriment of the smaller accounts. They stressed that having more than one distributor responsible for a given geographical area would make it difficult for the company to monitor the treatment of the beer to ensure its proper refrigeration and rotation so that beer over sixty days old would be removed from the market. Additional problems arise in the case of draught beer, since it is the responsibility of the distributor to make sure that the draught facilities in retail establishments are properly cleaned and maintained. The flavor of beer is especially susceptible to deterioration if this responsibility is not meticulously discharged. Moreover, with exclusive distributorships, it is easier for the supplier to supervise compliance

with state statutes and rules regulating the sale of alcoholic beverages.

On the pricing policies of Coors there is, of course, conflicting evidence. Mr. Coors testified that the company occasionally suggests to its distributors both wholesale and retail prices to ensure to both distributors and retailers a fair return on their investment and effort. He stated that the company has no policy regarding dealing with retailers who sell Coors beer at a discount, but that from time to time the company and its distributors try to persuade retailers not to sell at a discount, primarily because a larger than usual volume of sales disrupts the orderly allocation of Coors's supply, which generally is less than the demand. Mr. Coors and other witnesses for the company denied that it had ever terminated or threatened to terminate a distributorship on any ground related to its pricing suggestions. They maintained that the company had no power to direct its distributors to deal or to refuse to deal with particular retailers, or to otherwise interfere with the relationship between distributor and retailer, and that the company did not do so. Its terminations of distributorships were based upon a breach of the agreement or upon poor performance within an assigned territory. It was not disputed, however, that the company's right to terminate the distributorship without cause on short notice was a formidable one because of the substantial investment in equipment primarily suitable for the distribution of Coors. There was evidence, sharply contested, that one distributorship in Texas, owned by a Mr. Dixon, had been terminated because the distributor refused to cut off the supply of certain retailers who had sold Coors at a discount. But there was also evidence

that distributorships were held at the time of trial by individuals who had declined to abide strictly by the territorial limitations or to take any action to drive home to the discounting retailer the company's displeasure with the discounting. There was also evidence that from 1966 to the time of trial Coors beer was in fact advertised at a discount by retailers doing business in the general vicinity of the plaintiff's store in Brownwood, Texas.

Letcher acquired a sole proprietorship in the Brownwood store in January of 1966. About the same time, Coors entered the Brownwood market. Letcher advertised Coors at less than his own cost, using it as a "loss leader". Coleman, the distributor for that area, spoke to Letcher and to Mrs. Williams, an employee at the time, later a partner, and still later a shareholder in the business. She testified that Coleman said that he could not deliver any more Coors to them unless Letcher would promise not to offer it at a discount. Letcher refused to make that promise. Mrs. Williams testified that Coleman replied, "Well, it isn't my fault, I would like to sell you the beer but the brewery won't let me" and "I have a $100,000.00 investment here and I can't take a chance on losing it." There were some further deliveries after this exchange, but when Letcher again advertised Coors at a discount, the deliveries terminated, on June 3, 1966. Coleman resumed deliveries in August 1971, after Letcher had sold his interest in the store.

Coleman, on the other hand, testified that Letcher's advertising Coors at a discount had nothing to do with his discontinuing service to the Brownwood store. Coleman said that he did not get along well with Letcher on a personal level, that Letcher demanded

a wholesale discount, that he did not give Coors adequate storage space, and that the beer was not adequately displayed to the customers. In these circumstances, he testified, he determined not to do business with Letcher. According to the records introduced at trial, Coors had no knowledge of Coleman's refusal to service Letcher until July 1966. Campbell, Coors's representative in that part of Texas and its liaision with Coleman, testified that he became aware of Coleman's refusal to service Letcher only after the initial termination in June of 1966, when Letcher wrote to the company to see if he could obtain a supply directly from the brewery. He interviewed the two men individually. He found the source of the difficulty to be a difference of opinion as to how the beer should be treated at the retail store, colored by mutual dislike. He advised Letcher that he could not force Coleman to do business with him because Coleman was wholly independent in this respect. Business records Coors introduced into evidence, however, tend to support Letcher's version of the difficulties experienced with the distributor.[4]

[4]For example, the report of Mr. Campbell, Coors' field representative, to his superior at the firm, dated August 20, 1966, reads in part:

> Bill Reed called me Monday morning and said that a Mr. Letcher (owner of the Handy Liquor Store in Brownwood) wanted to buy beer from him. Stuart Coleman, our Brownwood distributor, is not servicing Mr. Letcher because he has been advertising our beer at cut rate prices.
>
> I filled Bill Reed in on this situation, and Mr. Letcher was informed that Reed only had enough beer to supply the retailers he has been supplying.

His report of July 16, 1966, stated in part:

> One problem developed from a local liquor store which is cutting Coors prices and advertised same in the newspaper.
>
> Mr. Coleman stopped delivery to this retailer [Letcher] and the retailer wrote Golden a complaint claiming Mr. Coleman said it was a brewery policy and a Texas brewery rep said to stop delivering.
>
> I talked with this retailer about our thinking about retailers making a profit on our product. He, however, said he would still cut our prices on Coors and adv it in the newspaper just as he does the other beers he handles.
>
> I talked with Mr. Coleman and asked that he not use us as an escape route or excuse but to precede (*sic*) on his own principles.
>
> I don't see any reason for Coleman to deliver to this retailer, however, until he is ready to stop these practices with our product.

His report of February 11, 1967, stated in part:

> As per Bob Eke's request, I stopped in Ballinger, Texas, and I talked with Mr. Harold Letcher. Mr. Letcher is is the owner of the Handy Liquor Store in Ballinger and Brownwood. He has the stores which Mr. Coleman has not been selling in Brownwood because he is a price cutter. Mr. Letcher has written several letters to Mr. Coleman and letters to Mr. Eke stating his position in ordering beer. In my conversastion with Mr. Letcher, he was very congenial, but he still feels he is right in his feelings that he has to treat all beers the same and when it comes our turn, he will advertise and cut our prices. He says he understands our beliefs, but he did not say what he plans to do.
>
> I have suggested to Stuart Coleman to cooperate with Mr. Letcher if he shows interest in selling our beer at the right price.

The record contains a number of similar exhibits with comments in the same vein regarding other retail accounts.

In a report to his superiors at Coors, Campbell noted, "I have suggested to Stuart Coleman to cooperate with Mr. Letcher if he shows interest in selling our beer at the right price."

II.

The key case in determining whether Coors's system of distribution violated section one of the Sherman Act is United States v. Arnold, Schwinn & Co., 1967, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249. In *Schwinn*, the Supreme Court had before it a record, generated in a seventy-day trial, replete with "information as to the total market interaction and interbrand

competition, as well as the distribution programs and practices [challenged by the Government]." 388 U.S. at 367, 87 S.Ct. at 1859. The distribution scheme in *Schwinn* was more complex than the one we have in the present case. Schwinn had instituted the practice of franchsing retail outlets for its bicycles. The franchisees were free to sell other brands of bicycles, and to set their own prices for sales of Schwinn bicycles. They were forbidden to act as wholesalers or agents for unfranchised dealers. They obtained their wholesale supply of Schwinn bicycles from the wholesale distributor for their area. Schwinn established geographic areas, each of which was assigned exclusively to one wholesale distributor. Schwinn required the distributors to sell only to franchisees and forbade them to sell outside their territories. Schwinn sold directly to distributors. It also made "sales to retailers by means of consignment or agency arrangement with distributors" and "sales to retailers under the so-called Schwinn Plan which involves direct shipment by Schwinn to the retailer with Schwinn invoicing the dealers, extending credit, and paying a commission to the distributor taking the order." 388 U.S. at 370, 87 S.Ct. at 1861.

The *Schwinn* Court noted that in White Motor Co. v. United States, 1963, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738, the Supreme Court had refused to say whether certain exclusive allocations of territories and customers were *per se* violations of the Sherman Act; not enough was known of the competitive effect of the practices to justify departure from the usual application of the "rule of reason". The *Schwinn* Court prefaced its holding by remarking that "we are remitted to an appraisal of the market impact of these practices." 388 U.S. at 373, 87 S.Ct. at 1862. The Court noted

that in *White* it had cited cases of a new firm just entering a business or a "failing company" as instances in which the anticompetitive effect of vertical restraints is minimal or non-existent and therefore permissible under a rule of reason analysis, and that neither applied to the Arnold, Schwinn Company. The Court observed: "We are here concerned with a truly vertical arrangement, raising the fundamental question of the degree to which a manufacturer may not only select the customers to whom he will sell, but also allocate territories for resale and confine access to his product to selected, or franchised, retailers." 388 U.S. at 378, 87 S.Ct. at 1865. The Court then drew a crucial distinction between "the situation where the manufacturer parts with title, dominion, or risk with respect to the article, and where he completely retains ownership and risk of loss." *Id.* Then the Court flatly stated: "where a manufarturer *sells* products to his distributor subject to territorial restrictions upon resale, a per se violation of the Sherman Act results. And . . . the same principle applies to restrictions of outlets with which the distributors may deal and to restraints upon retailers to whom the goods are sold." 388 U.S. at 379, 87 S.Ct. at 1865. The rule of reason would apply, however, in a case where the manufacturer *retains* ownership and risk of loss because, said the Court: "we are not prepared to introduce the inflexibility which a per se rule might bring if it were applied to prohibit all vertical restrictions of territory and all franchising, in the sense of designating specified distributors and retailers as the chosen instruments through which the manufacturer, retaining ownership of the goods, will distribute them to the public. Such a rule might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of mer-

chandising through independent dealers, and it might sharply accelerate the trend towards vertical integration of the distribution process." 388 U.S. at 379-380, 87 S.Ct. at 1866.

Whether a per se rule should attach to any sort of vertically imposed territorial restriction had been a subject of debate among anti-trust specialists for some time before and after *Schwinn.*[5] But the Supreme

[5]For a view that would tolerate many types of market division, see Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 75 Yale L.J. 373 (1966). For a view that contradicts many of Professor Bork's tenents, and that suggests that most territorial divisions serve to enhance trends toward monopoly power, and to impede the efficient allocation of capital and other resources of society, see Comanor, Vertical Territorial and Customer Restrictions: White Motor and its Aftermath, 81 Harv.L.Rev. 1419 (1968). For a paper that is more descriptive than argumentative, see Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 L. & Contemp. Probs. 506 (1965).

Vertically imposed territorial restraints have the obvious effect of reducing or eliminating intrabrand competition, whatever their effect may be on interbrand competition. Professor Comanor posits that firms manufacturing the same general sort of product will seek to insulate themselves from the effects of interbrand price competition by "product differentiation", that is, by reducing the substitutability of their product and thereby diminishing consumers' sensitivity to price.

Advertising of course plays a large part in this process. In the present case, for example, Coors would have a powerful incentive to bring home to the consumer the real or imagined uniqueness of its product in order to decrease the consumer's tendency to respond to the lower price of, say, Schlitz. There is nothing unlawful in this; indeed, in cases brought under section two of the Sherman Act, the defense of "superior skill, foresight, and industry" has been recognized since the decision in United States v. Alumnium Co. of America, 2d Cir. 1945, 148 F.2d 416 at 430.

Sometimes product differentiation is achieved in part by strategies at the retail dealer level that increase the dealer markup. The refrigeration, the development of its special aluminum packaging techniques, and some of the other measures Coors insists upon, at least insofar as its distributors are concerned, would fall into this category of methods to increase

Court has not departed from its holding in *Schwinn.* If anything, the Court, in partial reliance upon *Schwinn,* has intensified the per se rule in the area of territorial restrictions. See, for example, United States v. Topco Assoc., Inc., 1972, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515. *Topco* invoved territorial restraints that, though apparently primarily horizontal in nature, had strong vertical aspects as well. Topco

product differentiation. In this connection, Comanor notes, "[s]ales by discount houses or other outlets where price is the major condition of sale are hardly likely to promote buyer concern for the peculiar attributes of the products of a particular manufacturer," and are therefore viewed with disfavor by the manufacturer. 81 Harv.L.Rev. at 1427.

One obvious justification for territorial restrictions is that urged in the present case: that dealers on the wholesale and retail level will simply not make the capital investment required unless they can be assured of an absence of intrabrand competition and the greater risk it entails to capital investment. Just as obvious is the response that activities regarded most worthy of promotion by a society will offer prospective rates of return sufficient to attact the additional capital necessary, that risk is inherent in all capital investment to one degree or another, and that the most efficient allocation of capital resources may be achieved by eliminating restrictions that serve to insulate artificially a particular industry from competition.

Closely related to the investment argument is the argument that, absent the restrictions, there will be insufficient incentive for dealers to provide necessary services in relation to the product. The same counterargument based upon the necessity for the efficient allocation of economic resources applies.

Another justification frequently proffered, though not present in the case before us, is that vertically imposed restrictions are necessary to promote wider coverage of geographic markets. (Coors claims that its primary aim is to increase "market penetration" within existing geographical markets.) On the market coverage point, Comanor responds: "What is important is not whether these restrictions enhance market coverage or customer contact, for this they may well do, but rather whether restrictions of this character are likely to improve the competitive processes through which resources are allocated to these activities. While society generally approves of improved market coverage, it also generally deplores higher dealer markups and higher costs of distribution. Whether the additional gains

(This footnote is continued on next page)

Associates was an association of small and medium-sized supermarket chains organized to obtain merchandise under private labels, so that they might compete more effectively with larger chains. No member of the association was permitted to retail Topro brand merchandise outside the territory in which it was licensed to operate. There were similar restrictions upon sales at wholesale. The Court agreed with the finding of the district court that intrabrand competition in Topco brands would not be increased, and, in fact, the ability of the member chains to compete with the national chains might well be diminished by outlawing the challenged restrictions. The Court was not disposed "to ramble through the wilds of economic

are worth the additional costs, is of course, the essence of the problem of resource allocation—a problem whose solution we normally leave to the market place." 81 Harv.L.Rev. at 1431.

A further justification offered for vertically imposed restrictions is that without them, dealers would "invade" the territories of other dealers, seeking to take advantage of special sales efforts the local dealer has made in the form of advertising, provision of repair and other types of services and the like. However, many sorts of promotional activity that potentially redound to the benefit of any dealer in a given geographical area are usually undertaken by the manufacturer anyway (e.g., regional or national advertising), and those efforts that are undertaken by particular dealers (e.g., a liquor store advertisement in the local media advertising a "weekend special") are likely to be tailored to the local dealer and therefore difficult for the interloper to take advantage of.

But, it is argued, the existence of restrictions will be an incentive for the dealer to supply more "free" services, over and above those afforded by the manufacture, than he would otherwise. One rejoinder to this is that there are, in reality, no "free" services; that they are, in effect, paid for out of the single price charged for the product, and that pricing them in this manner leads to further "product differentiation" and a concomitant increased tendency toward monopoly power for the manufacturer of the particular product in question. The alternative, of course, is obvious in the case of many sorts of products (but not the product involved in the present

theory in order to maintain a flexible [as opposed to per se] approach". 405 U.S. at 610, 92 S.Ct. at 1134. Instead, the Court considered a judgment that competition with the national chains was to be favored at the expense of intrabrand competition was appropriate for Congress, not the Court, to make. It therefore held the territorial restrictions to be per se violations of the Sherman Act. Notwithstanding, Standard Oil Co. v. United States, 1911, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, *Topco* and *Schwinn,* read together, suggest that at this point we must accept the fact that the Court has set its face against both horizontal and vertical territorial restrictions, with the possible exception of vertically imposed restrictions by "new

case): additional services provided on the dealer level should be charged for separately, and consumer demand will then more accurately determine the level at which and variety at which they should be applied.

Another justification sometimes advanced for vertically imposed restraints is that they facilitate price discrimination among various classes of customers. This seems indisputable, as does the assertion that they also facilitate price fixing on the retail level. The question is whether price discrimination (when it is legal at all) is a sufficient justification for the otherwise anticompetitive effect of vertically imposed restraints. Price discrimination itself implies that less competitive (higher) prices will be charaged to some classes of customers. Moreover, the increased revenues possible through price discrimination are really available only to manufacturers already enjoying an "entrenched market position", and they tend to enhance monopoly power with no countervailing benefit to the consuming public.

Finally, it is sometimes argued that forward vertical integration will result if vertically imposed territorial restrictions are not allowed, and that such integration either (a) is somehow bad in and of itself, or (b) is uneconomical for the manufacturer relative to distribution through independent wholesalers and retailers. And of course there are the possible justifications, mentioned in the text, of the necessity of restrictions to promote new entrants or new products, or to promote safety when a particular product is subject to misuse.

entrants" and "failing companies" briefly mentioned in *Schwinn*.

A number of lower federal courts have sought to escape this conclusion. Some have centered their efforts to distinguish the case before them from *Schwinn* by focusing their attention on the following observation of the Court:

> In any event, it is clear and entirely consistent with the District Court's findings that Schwinn has been "firm and resolute" in insisting upon observance of territorial and customer limitations by its bicycle distributors and upon confining sales by franchised retailers to consumers, and that Schwinn's "firmness" in these respects was grounded upon the communicated danger of termination.

388 U.S. at 372, 87 S.Ct. at 1862.

In Janel Sales Corp. v. Lanvin Parfums, Inc., 2 Cir. 1968, 396 F.2d 398, cert. denied, 393 U.S. 938, 89 S.Ct. 303, 21 L.Ed.2d 275, for example, the court refused to find a contract clause prohibiting sales of Lanvin products by its retailers "except to consumers for use", a per se violation because the evidence was conflicting with respect to whether the clause was enforced in a "firm and resolute manner", or enforced at all. At least one other court has required some evidence of enforcement of vertically imposed restrictions before holding per se violations of the Sherman Act. Colorado Pump & Supply Co. v. Febco, Inc., 10 Cir. 1973, 472 F.2d 637, cert. denied, 411 U.S. 987, 93 S.Ct. 2274, 36 L.Ed.2d 965. In that case the court also stated that a mere designation in a contract of an area of primary marketing responsibility, without more, would not be a per se violation, following the suggestion of Plastic Packaging Materials,

Inc. v. Dow Chemical Co., E.D.Pa. 1971, 327 F.Supp. 213. This Court, however, has held that similar loose contractual designations and circumstances from which an understanding to adhere to the previous restrictions could be inferred, would constitute a per se violation. Hobart Brothers Co. v. Malcolmn T. Gilliland, Inc., 5 Cir. 1973, 471 F.2d 894.

Even this group of exceptions to *Schwinn* would not help Coors's position in the present case. From our summary of the evidence it is apparent that, although there is some evidence that some distributors from time to time made some sales outside their territories, the jury's finding that Coors had been "firm and resolute" in enforcing the territorial restrictions is not contrary to the manifest weight of the evidence, and must be upheld.

There are, however, other cases potentially helpful to Coors in that they attempt to temper *Schwinn's* per se rule where the character of the product in question requires special safeguards in distribution. The outstanding example is Tripoli Co. v. Wella Corp., 3 Cir. 1970, 425 F.2d 932, cert. denied, 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62, a case involving customer restrictions. A long-standing distributor of beauty supplies, manufactured by Wella, distributed certain Wella products intended for use by professional beauticians to members of the consuming public. Wella refused to deal with the distributor. The Third Circuit affirmed a grant of summary judgment for Wella in a treble damage action brought against it by the distributor, noting that the customer restrictions were reasonably necessary to protect the public, since some of the products involved could cause serious physical injuries if not applied by properly trained personnel;

the *Schwinn* per se rule was said to be inapplicable. Another example is the consent order in United States v. Safety First Products Corp., 1972 Trade Cases ¶74,223 (S.D.N.Y.1972), which permitted restrictions of sales of potentially dangerous fire protection equipment to "qualified persons" who met certain qualifications with respect to training, insurance, and experience.

The present case presents a tempting invitation. *Tripoli* suggests that we broaden the exception to *Schwinn* to products susceptible to damage in the distribution process unless that process is closely monitored. One may accept the testimony of witnesses of Coors that beer is just beer—unless it is Coors. But a great many products are good and popular. If an analog were sought to support such a departure from *Schwinn,* it could best be found in United States v. Jerrold Electronics, E.D.Pa.1960, 187 F.Supp. 545, aff'd, mem. 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961). In that case a tying arrangement, otherwise a per se violation of the Sherman Act, was permitted, because the services "tied in" with the sales of certain community television antenna equipment necessary to prevent malfunction of that equipment.

Assuming the validity of the *Tripoli* exception for the moment, we are unwilling to extend it to the facts of this case. The most important reason for our reluctance is that, whatever may be said of the efficacy of the territorial restrictions here in maintaining quality control, the restrictions also play a vital role in Coors's maintaining control over the wholesale and retail prices of its beer. Even if this element were not in the case, we think that the present record would not support the conclusion that the vertically imposed territorial restrictions are essential to the integrity of Coor's product to the survival of the firm. It may be that the process by which Coors beer is brewed necessitates refrigerated marketing and rotation of stock, and that vertical territorial restraints are helpful in supervising the proper application of these techniques, as well as in facilitating "orderly" allocation of the limited supply of beer to Coors's market areas and ensuring compliance with state law. But there is not enough in the present record to demonstrate that these ends could not be met by less restrictive means than those presently employed.[6] Moreover, although Coors has made a good case for its contention that its special marketing techniques are necessary to

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[6]It is impossible for us to say, on the basis of this record, that there is or is not a less restrictive alternative than the exclusive territories to maintain adequate quality control. The manufacturer here has never experimented with nonexclusive distributorships, for example. In any event, the strong evidence that the restrictions in this case were used to forward an illegal price fixing scheme renders further consideration of this point academic at best. Without this evidence of price fixing, the case would be in a much more favorable posture for such consideration.

The question whether there exists an alternative less destructive of competition than the restrictions imposed by Coors in this case is, of course, a proper inquiry under the traditional rule of reason analysis (which we hold foreclosed to us on these facts), well summarized by Judge Davis in Carter-Wallace, Inc. v. United States, 1971, 449 F.2d 1374, 1381, 196 Ct.Cl. 35:

> Conduct which can conceivably violate the Sherman Act may be examined in terms of three basic variables: (1) its economic effects, positive (furthering efficient performance of economic functions) and negative (anti-competitive impact on the free play of market forces); (2) the power of the parties in the markets which they serve; and (3) the motives underlying the conduct. A full rule-of-reason standard requires scrutiny of all three variables before a judgment is reached that a given practice is "reasonable" (permissible under the Act) or "unreasonable" (proscribed). A rule of reason inquiry may also eliminate examination of one or more elements, so that, for instance, anti-competitive effect wil be assessed but motive excluded as immaterial.

maintain the quality of the product, it is likely that many manufacturers could make—and support—such claims to one degree or another. There is many a whiskey the quality of which is allegedly based on spring water and close monitoring by the manufacturer.

Any justification of restrictions on the ground of special techniques for manufacturing or supervising distribution should be premised on the absence of less restrictive means to assure the same control over quality.

It is true that Mr. Coors testified that it would be impossible to get people to undertake distributorships without the assurance that their distributorships would be exclusive within their respective territories. Yet the record does not support that conclusion, beyond the testimony of one distributor that he would not have invested in the distributorship had it not been exclusive. There is no showing that willingness to make capital investments in distributorships would be seriously impaired or that adequate measures to protect the product would not be taken if the distributorship were not exclusive. And, even if these were demonstrated, there remains the problem, so strongly emphasized in the Court's opinion in *Topco*, of determining the utility of decreasing competition in one segment of the economy in order to enhance it in another.

We do not say that vertically imposed territorial restrictions may never comport with the Sherman Act; *Schwinn* itself conceded they might be proper in the case of new entrants in a highly competitive field or "failing companies". *And there may be other exceptions.* We say only that this record does not, as a matter of law, provide justification for excepting Coors from the effect of *Schwinn*, in light of the price fixing evidence.

Schwinn may be subject to criticism. Indeed, it has been criticized.[7] We must bear in mind, however, that the Supreme Court's entire discussion of the distribution scheme in *Schwinn* was premised on the lack of evidence that the scheme was used to facilitate price fixing. The Court said:

> If it were otherwise—if there were here a finding that the restrictions were part of a scheme involving unlawful price fixing, the result would be a per se violation of the Sherman Act. United States v. Sealy, Inc., 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238; United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 64 S.Ct. 805, 88 L.Ed. 1024.

388 U.S. at 373, 87 S.Ct. at 1862. The restrictions Coors imposed necessarily facilitated price fixing.

In United States v. Colgate & Co., 1919, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992, 997, the Supreme Court held:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he

[7]See generally Handler, The Twentieth Annual Antitrust Review—1967, 53 Va.L.Rev. 1667, 1680-89; Pollock, Alternative Distribution Methods After *Schwinn*, 63 Nw.L.Rev. 595 (1968); Sadd, Territorial and Customer Restrictions After *Sealy* and *Schwinn*, 38 U.Cin.L.Rev. 249 (1969); The Supreme Court, 1966 Term. 81 Harv.L.Rev. 69, 235-39 (1967); Note, Restrictive Distribution Arrangements After the *Schwinn* Case, 53 Corn.L.Rev. 515 (1967); Note Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason? 40 Geo.Wash.L.Rev. 123 (1971).

> may announce in advance the circumstances under which he will refuse to sell.

As we understand its position, Coors does not even rely on the *Colgate* doctrine insofar as its own actions are concerned. Rather, Coors urges that it had nothing at all to do with what happened between its distributor and the plaintiff, and implies that *this* conduct was shielded by *Colgate*. The *Colgate* doctrine operates within a narrow ambit, and does not immunize conduct that goes beyond a simple refusal to deal. The leading case limiting the scope of *Colgate* is United States v. Parke, Davis & Co., 1960, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505. In *Parke, Davis* the Court described the conduct that exceeded the limits of *Colgate* in the following terms:

> Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices. The retailers who disregarded the price policy were promptly cut off when Parke Davis supplied the wholesalers with their names. The large retailer who said he would "abide" by the price policy . . . was not cut off. In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and wholesalers to maintain retail prices and violated the Sherman Act.

See also F.T.C. v. Beech-Nut Packing Co., 1922, 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307; United States v. Bausch & Lomb Optical Co., 1944, 321 U.S. 707, 64 S.Ct. 805, 88 L.Ed. 1024; Albrecht v. Herald Co., 1968, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998.

The court correctly charged the jury that a conspiracy, combination, or agreement to fix prices was a per se violation of the Sherman Act.[8] There was evidence that would support a jury finding of such an agreement. There was testimony that a Mr. Dixon's distributorship had been terminated because he refused to "refuse to deal" with discounting retailers. There was evidence that Coleman refused to deal with the plaintiff because he felt constrained to enforce Coors's suggested retail prices. And there was evidence, chiefly in business records of Coors introduced at trial, that Coors's representatives were very attentive to wholesale and retail price levels. In the language of some of the reports, these representatives were quick to "suggest" to the distributors that they "take appropriate action" with respect to retailers who were not selling at the "right" price. A jury could reasonably conclude from these reports that the territorial restrictions have as much to do with Coors's attempts to maintain wholesale and retail price levels as with its concern with maintaining the quality of its beer on the market. Although we recognize that some form of territorial

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[8]Two leading cases are United States v. Socony-Vacuum Oil Co., 1940, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129, and Keifer-Stewart Co. v. Joseph F. Seagram & Sons, Inc., 1951, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219.

restrictions might be shown to be justified to protect a product unusually susceptible to damage in distribution, for example, or dangerous in the hands of the untrained, the restrictions here are too intimately related with practices within the per se proscription of *Parke, Davis*. The plaintiff therefore need not have alleged or proved a "public injury," as Coors contends. See Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 1961, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358; Klor's Inc. v. Broadway-Hale Stores, Inc., 1959, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741.

Our conclusion is strengthened by the fact that the Tenth Circuit has recently upheld a cease and desist order issued by the Federal Trade Commission against Coors, holding that there was substantial evidence to support the Commission's findings that Coors engaged in a conspiracy with its distributors to fix prices, that its territorial restrictions imposed upon its distributors were per se violations of the Sherman Act as interpreted in *Schwinn*, and that Coors used the termination provisions of its contracts with its distributors to enforce these anticompetitive policies. Adolph Coors Co. v. FTC, 10 Cir. 1974, 497 F.2d 1178. Perhaps uneasy with its holding on the territorial limitations point, the Tenth Circuit noted:

> Although we are compelled to follow the *Schwinn per se* rule rendering Coors' territorial restrictions on resale illegal per se, we believe that the per se rule should yield to situations where a unique product requires territorial restrictions to remain in business. For example, speed of delivery, quality control of the product, refrigerated delivery, and condition of the Coors product at the time of delivery may justify restraints on trade that would

> be unreasonable when applied to marketing standardized products . . . Perhaps the Supreme Court may see the wisdom of grafting an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason.

Id. at 1187. We recognize the validity of the reasons underlying the exception the Tenth Circuit might engraft on the *Schwinn* rule. But the exceptions might engulf the rule itself. Many manufacturers may assert a claim of uniqueness with respect to their products, and in good faith believe that they would be "driven out of business" without the restraints in question. Coors itself in the present case has argued that it needs the restrictions to survive, yet the record shows that the firm is thriving, not struggling, that it is expanding at a rate of ten percent of capacity a year, and that its expansion is internally financed. The core facts of this case suggest caution in assessing a manufacturer's assertion that a marketing restriction with demonstrable anticompetitive effects is necessary to its "survival". At the very least, assuming such an "exception" to the per se rule were to be allowed, a manufacturer should be required to demonstrate, as we have noted, the absence of means less restrictive of competition to achieve the same end.[9] But we need pursue the question no further here. Coors's restraints were ancillary to an illegal price fixing scheme.

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[9]For a recent case rejecting "considerations relating to quality control of the product [and shortages of the product]," advanced to justify enforcement of territorial restrictions similar to those involved in the present case, see Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc., E.D.Pa.1974, 375 F.Supp. 610, 622.

For a case suggesting that territorial restrictions are subject to the rule of reason if it could be shown that there were

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III.

Before passing to the damage problems in this case, we must briefly address Coors's remaining contentions on the liability issue. Coors argues that it was necessary for the plaintiff here to allege and prove a combination or conspiracy involving the plaintiff's competitors. Whatever may be said of cases involving, for example, group boycotts, we think that a private suit based upon price fixing and territorial limitations enforced by a manufacturer and his distributors may be maintained by a retailer hurt by those practices without proof that other retailers who continued to do business with the manufacturer or distributor were part of an illegal combination. None of the cases relied upon by the parties confronts this problem directly, nor have we found any.

Some cases, however, such as Simpson v. Union Oil Co., 1964, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 and Lehrman v. Gulf Oil Corp., 5 Cir. 1972, 464 F.2d 26, support our conclusion that a retailer hurt by the practices complained of in this case may maintain a treble damage action. The plaintiff here has adduced evidence sufficient to support the jury's conclusion that Coors conspired with its local distributor to deny him their product, because he would not abide by their pricing policy, and that because of the territorial

no "other practicable method of carrying on a prepaid insurance towing system," see Anderson v. American Automobile Association, 9 Cir. 1972, 454 F.2d 1240. However, the majority opinion noted: "If . . . the dominant motive for the restrictive arrangements is to compensate the contract stations for unprofitably low towing charges by limiting competition for repair work on members' vehicles, the whole vertical arrangement may operate to unreasonably restrain trade in the automobile repair market." *Id.* at 1246.

restrictions he was unable to obtain an alternate supply. The role played by other retailers in these practices should not affect the injured retailer's standing to sue, whatever other relevance that role might have to the case.

IV.

Coors argues that the practices complained of did not occur in or affect interstate commerce. This contention may be dismissed largely upon the authority of Burke v. Ford, 1967, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554. In that case, the plaintiffs in a treble damage action sought review of dismissal of their complaint. The action had been dismissed, and the dismissal affirmed in the court of appeals, on the ground that the division of territories among the liquor wholesalers involved in that case did not occur in or affect interstate commerce, since the liquor "came to rest" in the wholesalers' warehouses before being shipped to the retailers. The Supreme Court held that the dismissal was improper:

> Horizontal territorial divisions almost invariably reduce competition among the participants. . . . When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers.

389 U.S. at 321-322, 88 S.Ct. at 444. Price fixing was not involved in that case, as it is in the present one. Moreover, the effects upon interstate commerce ascribed to horizontal division of territories in *Burke* are equally attributable to the vertically imposed restrictions in this case.

The record shows that Coors's shipments into the state of Texas are substantial—their value was around $20 million in 1970—and it cannot be said that Coors's policies respecting pricing and distribution of its products moving into the state do not have sufficient impact upon interstate commerce to bring them within the ambit of the federal antitrust laws. Coors says there is no effect upon interstate commerce because there is always a shortage of their beer and the amount shipped to Texas "is not a product of fluctuations in retail sales." Regardless of whether we accept the full import of this last statement in Coors's brief, we must reject the argument that the application of the federal antitrust laws turns on whether, if the illegal practices were halted, a change would occur in the volume of the product involved crossing the boundaries of the state in which the particular plaintiff does business, particularly where the practices are widespread and constant, rather than sporadic and wholly local in character. In any event, there is evidence in the record tending to show that the unavailability of Coors at a retail outlet led to a diminution in demand for other products on sale at that outlet that moved in interstate commerce. This impact on other products has been held to have a sufficient effect on interstate commerce to bring the case within the federal antitrust laws. Lehrman v. Gulf Oil Corp., 5 Cir. 1972, 464 F.2d 26, 34-36.

V.

Coors has vigorously contended throughout this lawsuit that the cause of action asserted by the plaintiff Letcher cannot include any cause of action of the partnership composed of Letcher and Mr. and Mrs. Williams, nor of the Corporation subsequently formed,

of which the three individuals were the sole shareholders. The record shows that Letcher operated the retail liquor store in question from January 1, 1966, to January 1, 1967, as a sole proprietorship. On January 1, 1967, he sold a one-half interest to Mr. and Mrs. Williams, who had worked as salespeople in the store during the preceding year. Then, on September 1, 1967, the partnership was incorporated with Letcher and Mr. and Mrs. Williams as the sole shareholders. They operated the store from that date until July 17, 1971. The corporation was subsequently dissolved and its assets, apart from any legal causes of action against Coors, transferred to Mr. and Mrs. Williams, who reopened the store on August 14, 1971, and operated it as a sole proprietorship from that date to the time of trial. The legal causes of action against Coors were assigned to Letcher by an instrument dated April 13, 1972. The plaintiff also introduced into evidence a ratification signed by Mr. and Mrs. Williams reciting that they owned a one-half interest in the store as a partnership with Letcher from January 1, 1967, to the date of incorporation of the corporation, and that it was the intention of the partners that all assets of the partnership including leading causes of action were to become assets of the corporation. It further recited that Mr. and Mrs. Williams "ratify" the institution of the present lawsuit by Letcher and that neither of them had any further personal interest in the cause of action.

Relying on cases holding that an antitrust action may not be brought individually by a partner in a partnership nor by a shareholder of a corporation, Coors advances two primary objections to Letcher's standing to bring this suit. The first is that the "ratifica-

tion" was ineffective to transfer the cause of action to the corporation, and that the partnership therefore should have been named as a party to the suit. Since by the time of trial the four-year statute of limitations had run on any claim that might have arisen during the existence of the partnership, Coors says, no damages may be awarded for any harm suffered by the partnership attributable to Coors's violation of the antitrust laws. Coors does not, however, specify in what respects the ratification was inadequate, nor does it suggest what the proper manner of transferring the cause of action would have been. Second, with respect to the assignment of the corporation's cause of action to Letcher, Coors argues that

> in reality [the assignment] is not corporate action but merely signifies the desires of two persons who happen to be on the Board of Directors of the corporation. . . . No certified copy of any resolution of the Board of Directors of the corporation accompanied said exhibit. Furthermore, there was no evidence whatsoever that the corporation ever did any business with a Coors distributor or that it ever requested and was refused Coors beer.

In our view, these objections, given the factual context of this case, seek to exalt corporate form over substance. All the testimony at trial, taken together with the "assignment" and the "ratification", would certainly estop Mr. and Mrs. Williams from ever bringing a suit against Coors on the same cause of action. We are dealing with a small retail outlet, owned and operated by three individuals over the period of time relevant to this suit, and in these circumstances we think that Coors must have been aware of the identity

of the plaintiff and the genesis of his cause of action. There is nothing in the record to the contrary. There is no danger of exposure to multiple suits arising out of the facts here. Moreover, there is no demonstration of any other prejudice to Coors attributable to the failure—if there were a failure—to comply strictly with Texas law regarding the transfer of assets from one form of business organization to another or the ratification of corporate action. Though Coors's objections are grounded on this purported failure, its counsel did not examine Letcher or the Williamses, the only individuals owning or operating the store during the period in question, as to whether they complied with the formalities of the Texas corporation and partnership law, what their intent was in changing the corporate form, or pursue other lines of inquiry relevant to its objections. On these facts, we hold Coors's objections to the plaintiff's standing to sue to be insubstantial.

VI.

Coors objects to the admission of certain statements of Mr. Coors describing the degree of market penetration the firm had achieved in its various marketing areas. This general sort of information was relevant to the cause of action alleged under section two of the Sherman Act. The section two claim was abandoned at trial. Coors now urges that the admission of this testimony prejudiced the jury. Because the relevant market had been designated as the market for beer in Brownwood, Texas, in the pretrial order (a designation we neither approve nor disapprove), the relevance of the challenged statements regarding market penetration in other areas is open to serious question, but, in light of the entire record, the substantial evidentiary

basis for the jury's verdict, and considering the nature of the statements, we cannot say that admitting the evidence was so prejudicial as to require setting that verdict aside.

VII.

Coors objects to the trial court's action in reopening the case before charging the jury to receive into evidence as an exhibit the "ratification" already discussed. We note that when Mr. and Mrs. Williams, who signed the challenged instrument, were on the stand, counsel for Coors did not delve into the irregularities now complained of in connection with the transformations of the store's corporate form from sole proprietorship to partnership to corporation and back to sole proprietorship. This failure, coupled with the absence of any showing of prejudice to Coors stemming from the irregularities, leads us to conclude that the trial court did not abuse its discretion in admitting the exhibit.

VIII.

Coors complains that the trial court demonstrated a prejudicial attitude toward it. We dismiss this contention as insubstantial.

IX.

This case is unusual in that the plaintiff is seeking damages because his supplier cut off his supply of a product he had always sold for less than it cost him.

Between January 1, 1966, and June 3, 1966, the date after which no further deliveries of Coors were

made,[10] Letcher testified that he sold roughly 1,000 cases of Coors at the Brownwood store, and that all Coors beer was sold at less than he paid the distributor for it. Letcher stated that he sold Coors below his cost, as a "loss leader", in order to attract business. Mrs. Williams testified that, after deliveries of Coors's were halted in June, 1966, the store experienced a decline in business. She said that customers, before the termination of service by Coors' distributor, would come into the store primarily to purchase Coors but would frequently buy other items as well, as a matter of convenience, and it was her impression that these customers no longer patronized the store after the termination. Coor's marketing expert disputed the accuracy of this recollection or impression. He stated that the market for beer and liquor items was very sensitive to variations in price, and that consumers often made purchases of different types of items at different retail establishments, depending on relative prices. Letcher and the Williamses testified that they experienced a loss on sales of all products at the store, and that, in order to compensate for the loss, they reduced their markup on all items, from an average of 25 percent to an average of 15 percent after the termination. Moreover, Mrs. Williams testified that, based upon her daily experience as a salesperson at the store,

[10]The record shows that the store ran out of its supply of Coors on June 20, 1966, and Coors contends that if any comparison is to be made of bank deposits (and it denies this method is valid), that comparison should be of the thirty-day period before June 20 and the thirty-day period following. This suggestion may have some merit if we assume the bank deposits accurately reflect sales, but, as will appear in the text, we cannot make that assumption on the present record.

her opinion was that the "loss of markup profits" attributable to the termination was $75 to $100 per business day. She did not offer any facts in support of that conclusion, nor was "loss of markup profits" defined.

Most of the evidence relating to damages was presented by Dr. Dickson, the plaintiff's expert, and, because the jury returned a verdict for damages in the amount of $101,011, the exact amount of his estimated computation of "lost profits and good will", we must examine his testimony carefully. His testimony was based upon a rather limited store of business records tendered to him by the plaintiff, including the corporate income tax returns for the years in question, certain "operating statements" of a highly summary character, and certain receipts from the Coleman distributing concern. These items are all we have in the record. Dr. Dickson apparently based his testimony on certain other financial records as well that were present in the courtroom and examined by the defendant for the first time at trial. These further items contained certain bank statements, but what else they contained is unclear to us.

What is clear, however, from the testimony is that no accurate records of the sales for 1966, on an itemized product-by-product, daily or weekly basis or otherwise, were offered into evidence, nor were there any inventory records from which such a breakdown could be derived. That is, all products sold were lumped together, and Dr. Dickson testified that he analyzed sales *by looking at the gross bank deposit records* for the store. On that basis alone, he concluded that, because the bank deposits for June 1966 were $20.270,

and those for July 1966 were $13,144, the termination of service by Coors' distributor cost the plaintiff the difference between the two sums. The difference was 53 percent of the lower figure, or, put another way, if one wanted to derive what the June deposits had been, one would multiply the July deposits by .53 and add that product to the July deposits.

Coors, of course, strenuously objected to this part of the calculation, noting, first, that there were unusually large bank deposits made in the opening days of August 1966, and that if one averaged the deposits for the months of June, July, and August together, or, alternatively, included the early August deposits with the July deposits, there would be no discernible decline in "sales". Second, Coors objected to the *post hoc ergo propter hoc* brand of reasoning applied to the decline in sales, if there were any decline at all. There was, Coors says, no showing at all of any causal relationship between the termination and a decline in sales. There was, in fact, no actual decline in sales in the months after July 1966. Using though not approving the plaintiff's own measure of sales—bank deposits—, the exhibits demonstrate that the sales actually increased after the termination in June. The circumstance, coupled with the dubious character of the July "decline" in bank deposits, the fact that no records were introduced into evidence relating to daily or weekly sales on a product-by-product basis and the fact that by his own admission *Letcher sold all the Coors he ever purchased from the distributor at a loss,* raises serious doubt that Coors' violation of the antitrust laws caused Letcher any injury at all. We will return to this problem after tracing Dr. Dick-

son's thread of computations, as the jury apparently did, to its bottom line.[11]

Dickson assumed that by multiplying the actual bank deposits ("sales") by .53 and adding the product, he would arrive at a "gross sales" figure that would accurately reflect what the sales would have been had the termination of Coors not occurred. He then determined that the markup on goods sold was the gross sales minus the cost of goods sold, divided by the cost of goods sold. The striking difficulty with this formula is the computation of "cost of goods sold" for 1966, for Coors's expert in accounting testified

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[11]The following equations, derived from the exhibits, may clarify the discussion in the text.

$$\text{Markup} = \frac{\text{Actual sales—Cost of goods sold}}{\text{Cost of goods sold}}$$

(Markup was derived for each fiscal period from 1966 through 1971)

$$\text{Lost sales} = .53 \text{ x Actual sales}$$

(How the multiplier of .53 was derived is explained in the text.)

$$\text{Lost gross profits} = \text{Lost sales} - \frac{\text{Lost sales}}{(1 + \text{markup})}$$

$$\text{Lost net profits} = \text{Lost gross profits} - (\text{sales taxes} + \text{inventory carrying costs} + \text{salaries})$$

(The record does not reveal how the figure of "inventory carrying costs" was derived.)

$$\text{Goodwill lost} = \frac{\text{Total lost net profits}}{\text{Total months of alleged antitrust violation}} \text{ x } 12 \text{ x } .78 \text{ x } 15 \text{ x } .14$$

(The division by number of months' alleged violation and multiplication by 12 is to annualize the figure; the multiplier of .78 is to deduct "sales tax or corporate profits tax"; the multiplier of 15 represents, presumably, Dr. Dickson's judgment as to how many years in the future an antitrust plaintiff should be compensated for lost profits; and the multiplier of .14 is intended to reduce—the record does not show how or why—the figure already derived to its present value.)

that, based upon his study of the books tendered to Coors for the first time at trial, he concluded that they were incomplete; that "sales" were in fact bank deposits made; that there was no breakdown of the ledger into the traditional sections for capital, assets, liabilities, or inventory; that there was no accounting for cash on hand; and that the books, such as they were, did not balance. It is therefore difficult to see how an accurate "cost of goods sold" could be arrived at, at least on the basis of the present record.

Assuming, however, that the figure is accurate, Dickson computed the markup for 1966 as 20 percent. He proceeded to compute the markup for each successive accounting period through July 1971. He determined the "lost sales" for each period by multiplying the actual deposits by .53, and then he applied the markup figure derived for each period to the amount of "lost sales" to arrive at "lost gross profits". From this figure he subtracted the additional sales taxes, inventory carrying costs, and salaries that would have been incurred had the "lost sales" actually been made. This computation apparently made no allowance for the generally short supply of Coors or other exigencies. The result was "lost net profits". This figure, in turn, was used as a basis for computing "lost goodwill": it was translated into an annual figure, a 22 percent deduction for "sales tax or corporate profits tax," in Dickson's words, was made, and the present value of fifteen years' worth of the resulting "net lost goodwill" was added to the "net lost profits" for a grand total of $101,011.

Dr. Dickson offered an alternate method of computing damages, based upon "lost markup". This computation started with the assumption that, after the termina-

tion of Coors's service, the markup decreased from 24 percent to 14 percent. Apart from the fact that this computation was apparently not relied upon by the jury, in its assessment of damages, we do not think it merits extensive discussion here, because there is no adequate basis in the record for the assumption that the markup in fact decreased from 24 percent to 14 percent.

The general rules relating to antitrust damages are easy to state, but difficult to apply. It is said that, once a plaintiff in a private antitrust action has proved that the defendant violated the law and that this violation caused him injury in fact, the plaintiff is held to a less rigid standard of proof with respect to the actual dollar amount of his damages, because "economic harm is intangible and analysis of it is complex". "[A] wrongdoer should bear the risk of uncertainty that inheres in measuring the harm he causes". Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 1967, 80 Harv.L.Rev. 1566, 1572. See Bigelow v. RKO Radio Pictures, Inc., 1946, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652; Story Parchment Co. v. Paterson Parchment Paper Co., 1931, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544.

In short, the record shows no support for the jury's finding of injury in fact attributable to Coors's policies of pricing and territorial restrictions. We are mindful of the deference due to the jury's findings. As this Court recently stated in Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 5 Cir. 1973, 471 F.2d 894, 902:

> The jury has the function of weighing . . . evidence. An appellate court should not substitute its own judgment unless there is a complete absence of substantial probative facts to support the jury's verdict, Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946).

This record demonstrates such an absence of "substantial probative facts". There was evidence that daily sales records for the store were kept, yet none of Dr. Dickson's testimony was based upon them. Indeed, so far as we can tell, no effort was made to introduce them at trial, and they were never made available to the defendant. Instead Dickson's entire computation of "lost net profits" was based upon a comparison of bank deposits made during the month in which the termination occurred and the month immediately following. His assumption that these deposits accurately reflected gross sales of all products for the periods in question is unsupported. Moreover, as we have emphasized, it is undisputed that Letcher sold every case of Coors obtained from the distributor at a loss. In order for his business to have suffered damage from the termination, the profits from the sales of other products in the store attributable to the presence of Coors as a "loss leader" not only must have been sufficient to make up the loss incurred in selling Coors but also have exceeded the profits on such products earned after the termination. Some of Dr. Dickson's testimony seems to be based on the assumption that Coors was being sold, and would have been sold in the future, at the same markup applied to all other products. This aspect of the case needs clarification on remand. A private treble damage plaintiff, in proving injury in fact, is not entitled to the benefit of the assumption that he enjoyed a markup on a product that in fact he sold at a loss.

We hold that on the record before us a finding of injury in fact could not be based on Dr. Dickson's comparison of bank deposits for June and July, 1966, or on the unsupported conclusion in the testimony of Letcher and the Williamses that they dropped the markup 10 percent after the termination. It is not within our province to say how much more evidence and what sort of evidence should be adduced on remand to prove the fact of injury. It is enough to say, in addition to the reservations we have already noted, that the record indicates that the business operated profitably after the termination of the Coors distributorship to the time of trial. When relative degrees of profitability are concerned, as opposed to the destruction of all or part of a going concern, there is no substitute for accurate sales records and inventory accounts. Isolated comparison of bank deposits or unsupported conclusions respecting markup advanced by the plaintiff just might be relevant, if accompanied by supporting relevant data.

If the plaintiff on remand can bring forward sufficient evidence to take the case to the jury on injury caused by the defendant, there are several methods of approximately the dollar amount of damages. There are two widely accepted methods. One looks to the degree of profitability of the injured business before and after the violation (and this was the one Dr. Dickson attempted to use in this case.) The other looks to the profitability of a business entity as nearly identical to the injured business as possible except for the fact of damage attributable to an antitrust violation. See Lehrman v. Gulf Oil Corp., 5 Cir., 1974, 500 F.2d 659.

Proving injury in fact and proving damages are obviously similar tasks in an action of this nature. In neither undertaking did the plaintiff seek to introduce for purposes of comparison evidence of the performance of a retail firm similar to his own, except that it continued to have a Coors account. Moreover, it appears from the record that the store reopened as a sole proprietorship one month after Letcher sold his interest, and that it enjoyed the services of the Coors distributor from that time at least until the time of trial. An examination of the store's profitability after the resumption of Coors service would be relevant to the problems of proof on the issues of injury and damages.

Because the plaintiff faces a substantial hurdle on remand in proving injury, we need not dwell at length on every point raised by Coors in its attack upon the plaintiff's proffered computations of damages. Coors' point with respect to the admission of Dr. Dickson's summaries from the business records of the firm is well taken. A proper foundation for many of his figures was not laid. On the most basic level, we are unable to tell from the present record just how Dr. Dickson arrived at his figures for "sales", "cost of goods sold", and several other figures that play prominent parts in his computations. There is, as we have said, reference in the record to a sales ledger or daily sales record, but this, unaccountably, was not advanced as a basis for Dickson's testimony. Further, although the record indicates that Coors was often in short supply, Dickson's computations made no attempt to take this into account in determining what the profits would have been but for the termination.

Coors objects to the inclusion of the element of goodwill (the term Dr. Dickson used for lost future profits after the store closed in July 1971, and Letcher disposed of his interest in it) on the ground that, in fact, service was resumed in August 1971, when the Williamses reopened it as a sole proprietorship. We regard it as an open question whether Coors's distributor would have persisted in his refusal to service the Brownwood store so long as Letcher owned an interest in it and declined to follow Coors's retail pricing policy. If so, (assuming injury were demonstrated) loss of future profits would have been an appropriate element of damages. This is so even though the retail outlet itself continued to do business after the owner who refused to comply with illegal attempts to fix prices had sold his interest in the concern to others, presumably at a discount reflecting the loss attributable to his continuing antagonism to Coors's pricing policy. Evidence regarding the consideration for the transfer of his interest in the store to the Williamses would of course be relevant on the latter point.

Coors's contention that the jury should have been informed of the fact that actual damages are trebled under section four of the Clayton Act has been decided against it. Pollock & Riley, Inc. v. Pearl Brewing Co., 5 Cir., 1974, 498 F.2d 1240.

* * *

The judgment of the district court is affirmed to the extent it is based upon the jury's finding of a violation of the antitrust laws on the part of Coors. We vacate the judgment insofar as it is based on the jury's finding of injury and its assessment of damages. We also vacate the court's award of attorneys' fees. We remand the cause for further proceedings

consistent with the views we have expressed, especially with regard to the determination whether Coors's violation of the Sherman Act caused injury to the plaintiff and, if so, the amount of the injury. If on remand, injury is proved and damages awarded, the district court may also award reasonable attorneys' fees.

Affirmed in part, vacated in part, and remanded.

GEE, Circuit Judge (concurring specially):

I concur fully in all portions of the court's opinion except in Part II.

While I agree with the result reached in that part, I would, having decided that substantial evidence supports the verdict and judgment below that the vertically-imposed territorial restrictions were ancillary to price-fixing and that the restrictions thus were illegal per se, stop. "In those situations, it is needless to inquire further into competitive effect because it is established doctrine that unless permitted by statute, the fixing of prices at which others may sell is anti-competitive, and the unlawfulness of the price fixing infects the distribution restrictions." United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375-376, 87 S.Ct. 1856, 1864, 18 L.Ed.2d 1249 (1967). Discussion of issues which might be raised in a pure territorial-allocation case is unnecessary to our decision.

Reporter's Transcript, Testimony of Everett L. Barnhardt, Spriggs' Adverse Witness.

* * *

THE COURT: All right. This will be exhibit—

THE CLERK: 80.

THE COURT: —80.

Have you had an opportunity to look at that, Mr. Barnhardt?

THE WITNESS: Uh-huh.

Q BY MR. ELKE: You looked at that, Mr. Barnhardt?

A Yes.

Q It has on the bottom revised—do you see that—the date?

A Yes.

Q Then there is some material above the paragraph that starts "In order to maintain a successful wholesale or retail business . . . ." Above the paragraph.

It is the only copy we have, Your Honor.

A Yes, I see what you're talking about.

Q Those particular policies had been in force in the Adolph Coors Company with respect to its distributors much prior to 1970, had they not, sir?

A I would assume that somewhat prior.

Q Sir, some of the things you were telling us about were the policies of Adolph Coors Company in respect to its distributors from—whenever the distributors started coming to Los Angeles County; isn't that right?

A Yes, I believe that's right.

THE COURT: We can get to this a lot faster.

Q BY MR. ELKE: Will you look at the paragraph that starts with the 3?

THE COURT: We are short of time and I've got to try to cut this, not cut it out but just do it faster.

Would you look at the third paragraph, sir.

THE WITNESS: Yes, sir.

THE COURT: Do you know whether there was a similar provision in the policy manual before the revision of June 1970?

THE WITNESS: No, I don't know for sure.

THE COURT: Do you know whether there was any policy concerning pricing before June 1970?

THE WITNESS: No, sir, I do not know for sure.

THE COURT: Would your answer be the same to the last paragraph on the first page of the exhibit?

THE WITNESS: It would.

THE COURT: Would your answer be the same to the paragraph that's on the second page?

THE WITNESS: Yes, sir, it would.

THE COURT: Since the title at the top of the page is Coors Pricing Policy and the bottom notation says Rev. 6-70, there is an implication that there was a Coors pricing policy before June '70, because you can't revise something that's totally new.

THE WITNESS: Except, Your Honor, in one regard, and that is these are excerpts, apparently, from a policy manual, and it is the manual that was revised, and it would not necessarily mean that any one part of that manual existed prior to the revision because the whole manual had been revised. There could be additions and supplements and changes. It's the manual itself that was revised. Now, if it helps, Your Honor, I didn't write the manual.

THE COURT: All right.

Q BY MR. ELKE: It is true, is it not, Mr. Barnhardt, that you don't know any difference in the pricing

policies of Coors brewery insofar as it related to its relationship with its distributors between 1970 and 1960?

A I don't recall any.

Q So as far as you understand, they were the same?

A I said I don't recall any.

Q You don't recall any changes?

A That's right.

* * *

Reporter's Transcript, Testimony of William Kistler Coors, Spriggs' Adverse Witness.

THE COURT: * * *

I think we can get at it this way: Sir, having in mind your testimony concerning the policy of Coors during the period in question concerning pricing, did your company impose territorial lines with respect to distributorships for the purpose of carrying out its pricing policy?

THE WITNESS: I don't see the connection, Your Honor. I think I would have to answer that in the negative.

THE COURT: Okay.

* * *

Reporter's Transcript, Coors' Objections to Admission of Spriggs' Exhibit 80.

* * *

MR. ELKE: We would offer exhibit 80, Your Honor.

MR. DEL GUERCIO: Coors pricing policy.

(Sotto voce discussion between the court and the clerk.)

THE COURT: Subject to all of the objections that you made to the interrogation concerning pricing, do you have any other objections?

Those can be reserved and overruled.

MR. BRADLEY: I think those would have included the objections we would make to 80 right now, Judge.

THE COURT: All right. They are deemed made and overruled, and 80 is received.

* * *

Notice of Intended Decision.

Superior Court of the State of California for the County of Los Angeles, No. 869 998.

Filed December 17, 1976.

[Caption Omitted in Printing]

1. The Court finds that Spriggs does have standing to sue, contrary to the contention of Coors. *But for* the Court's conclusion with respect to whether a violation of the *Cartwright* Act occurred, the question of the nature and extent of the injury to Spriggs would be the subject of a later phase of the trial. To put it another way, the "impact-injury" issue interjected by the Coors Opening Brief is rejected by the Court. The question of burden of proof would be determined in that proceeding, but the Court will not reach that phase.

2. The Court has concluded that Coors' territorial limitations imposed upon Spriggs did not *per se* violate the *Cartwright* Act. This conclusion is supported, and really compelled by *LaFortune v. Ebie,* 26 C.A. 3d 72. As discussed by Justice Fleming, "The United States Supreme Court has not declared that all territorial limitations automatically violate the Sherman Act." The distributor agreements used by Coors are clearly vertical restraints, even though the acceptance of them by other distributors creates a horizontal appearance. Using a bad take-off on the ripe metaphor from *LaFortune,* the restraint applied by Coors is a skyscraper rather than a low-flying whorehouse.

The dispute in the briefs as to whether the federal cases under the Sherman Act are binding or merely persuasive is largely an exercise in semantics. If there

was a federal case completely on all fours and no California case in conflict with it, this Court would follow the federal case. The problem is more sophisticated. *Schwinn* is not on all fours; *LaFortune* is certainly close, and is a decision of this appellate district. To the extent public policy is involved, this Court can discern no public policy in the California cases requiring the simplistic approach of applying *Schwinn* to this case. Since application of *Schwinn* is not compelled, and since it would be illogical to this Court as an original proposition, it will not be applied.

The Court accepts and adopts the analysis of *LaFortune* in Coors' Reply Brief, pages 10 to 13.

Although the Court is of the opinion that *LaFortune* is sufficient justification for not applying a *per se* approach, it is not possible to ignore the impact of the legislative changes which occurred in 1972 in the enactment of Business and Professions Code § 25000.5. During the years in question, no case held that territorial limitations such as used by Coors was a *per se* antitrust violation. No case directs that *Schwinn* be given retroactive effect.

The Court has in mind the thoughtful reply in Spriggs' Reply Brief concerning retroactivity (pages 11 to 18) but there are no California cases that so delicately do an arabesque on the head of a pin, and this Court is not compelled to reach the result discussed in *Hanover*. By 1972, the Legislature of this state expressed a policy as to territorial limitations. The statute is silent as to retroactivity. At best, both *Schwinn* and Business and Professions Code § 25000.5 are *after the fact* events. However, section 25000.5 is more specific and relates to the exact question before the

Court. It is a clear-cut expression of public policy in California, albeit *after the fact* on the specific question involved in this case.

3. The Court finds no horizontal combination in violation of the *Cartwright* Act. Although the other Los Angeles distributors of Coors beer acquiesced in the territorial restrictions, it is clear that the restrictions were imposed upon them as well as Spriggs from "on high", to wit, from Golden, Colorado. There is no evidence of collusion by the other distributors.

4. The Court finds that Coors is not bound by the doctrine of collateral estoppel by reason of the decisions in *FTC, Copper Liquor* and *A & S.*

The doctrine of collateral estoppel cannot be used to require a court to apply inappropriate law or appellate decision. The real thrust of Spriggs' argument on collateral estoppel is to require application of the *per se* approach. As indicated above, such conclusion cannot be reached by this Court.

Secondly, the three cases relied upon by Spriggs did not involve a determination of completely identical issues.

Thirdly, to the extent that the question is open it does not appear to be appropriate to apply the doctrine *offensively* in favor of a stranger to the prior litigation, which is the result Spriggs urges.

5. The decision in *Spriggs v. Coors,* 37 C.A. 3d 653, is not dispositive of the issues in this trial. For some purposes it is clearly law of the case. It can no longer be urged that California courts have no jurisdiction to enforce the *Cartwright* Act against Coors. That was the question on appeal. An analysis

of the decision in *Spriggs v. Coors, supra,* compels the conclusion that the language in the first paragraph on page 662 of the official reports is at the best *dictum,* which is not law of the case, and is more fairly characterized as a passing comment in the discussion as to interest of state and federal governments in the outcome of antitrust law enforcement. Certainly no one could seriously urge that the Court of Appeal intended that paragraph as a dispositive statement of *Schwinn,* the concept of *per se* violations or as a comparison with the rule of reason.

6. Having concluded that the conduct of Coors in imposing territorial limitations on their distributors in Los Angeles County did not *per se* violate the *Cartwright* Act, it has been necessary to consider whether such conduct was unreasonable under all of the facts and circumstances, and thus illegal under the Act. The Court has concluded that the restrictions are reasonable.

Some of the factors supporting this conclusion are:

a) There is no evidence of any restraining effect on interbrand competition.

b) There is a significant need to protect product quality. Beer is a very perishable commodity, and Coors beer is more so, because of the peculiar brewing and filling process employed by Coors. The manufacturer has a legitimate need to insure quality control and no alternative or less restrictive method appears appropriate.

c) Coors, and the public, had a legitimate interest in full service for both large and small retailers. Without territorial limits, big retailers would be "overserviced" and small outlets barely serviced at all. The

public had a right to the availability of fresh Coors beer at every little corner market, and not just at the supermarket or discount drugstore.

d) The sale and distribution of beer involves delicate public policy questions and since the repeal of prohibition has involved extensive state regulation in California. Coors, and the public, has a valid interest in assurance that distributors will comply with the law, regulations and publicly accepted standards of propriety. This can be accomplished in an effective way only by absolute designation of responsibility under territorial guidelines. The possibility of the distribuor pointing to his "brother" and saying "he did it" is eliminated by the Coors system. No such policy considerations exist in the case of the marketing of bicycles.

Having considered the factors discussed in *Chicago Board of Trade v. United States,* 246 U.S. 231, this Court concludes that the restraint imposed by Coors was reasonable and not in violation of the *Cartwright* Act.

The Court has considered the arguments of Spriggs concerning intrabrand competition, and the teaching of *Schwinn* and *Topco* concerning the possible benefit of promoting interbrand competition as being insufficient justification for eliminating intrabrand competition. However, as a public policy matter there is no evidence that the people of Los Angeles County would have benefitted from intrabrand competition, and, in fact, there is evidence to the contrary. Unfortunately, the Court cannot apply the rhetoric from *Topco,* quoted at pages 19 to 21 of Spriggs' Reply Brief, to the realities of this case.

A short explanation from the Court to counsel is appropriate to explain the form of this Notice of Intended Decision. The time necessary for the Court to analyze the evidence, study the persuasive briefs, and read most of the cases cited by counsel has been considerable. Trial courts should determine facts, and do so in sufficient detail so that an appropriate record exists for appeal. Trial courts must also make policy determinations and reach legal conclusions. In this area, however, as counsel well know, the determination by the trial court is only a vehicle by which an appeal can proceed—it has no effect on the reviewing court. It is not even "persuasive"—to borrow a phrase from the Coors briefs.

Therefore it would be an indulgent ego trip for the trial court to attempt to write a polished (or even rough) decision or opinion in the style of an appellate decision, and also an inappropriate diversion away from the main function of trial courts.

Counsel for Coors shall file and serve Findings of Fact, Conclusions of Law and Judgment in accordance herewith.

DATED: December 17, 1976.

/s/ LESTER E. OLSON
Lester E. Olson
JUDGE OF THE SUPERIOR COURT

Findings of Fact and Conclusions of Law.

Superior Court of the State of California for the County of Los Angeles No. 869 9998.

[Caption Omitted in Printing]

The above case came on for trial on November 15, 1976, before the court without a jury, which was expressly waived by both parties. Trial continued on November 16, 17, 18 and 19, 1976. Richard A. Del Guercio and Thomas Elke appeared as attorneys for cross-complainants and G. William Shea, Richard F. Seiden and Leo N. Bradley appeared as attorneys for cross-defendant. The court heard the oral testimony and reviewed the documentary evidence offered by the parties, and the cause was submitted for decision; the court, being fully advised, makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Adolph Coors Company ("Coors") is a corporation organized and existing under the laws of the State of Colorado and is qualified to do business in the State of California.

2. Coors manufactures, brews and bottles beer only in Golden, Colorado. Coors sells its beer to wholesale distributors in the following States: Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Utah, Washington, Wyoming and parts of Texas. All sales are made by Coors F.O.B. Golden, Colorado. Coors does not distribute or sell its beer other than to wholesale distributors.

3. R. E. Spriggs Company, Inc. was incorporated under the laws of the State of California from January 30, 1946, to March 19, 1969. On the latter date,

this corporation was dissolved and all existing assets were distributed to this shareholders and this action was continued in the corporate name. On August 27, 1976, Phoebe Spriggs was substituted as cross-complainant as successor-in-interest to the Estate of Ralph E. Spriggs, Deceased. R. E. Spriggs, individually, and R. E. Spriggs Company, Inc., were licensed in the State of California to operate a wholesale beer distribution business. R. E. Spriggs Company, Inc., Ralph E. Spriggs and Phoebe Spriggs are collectively referred to hereinafter as "Spriggs" unless otherwise expressly noted.

4. Since approximately 1951 Coors has had written contracts with all of its wholesale distributors who distributed Coors beer in Los Angeles County and in other areas in California. The terms of such written contracts, except for the territories set forth therein, were substantially the same. Each such distributor could distribute only in the territory designated in his written contract with Coors.

5. On August 2, 1951, Coors and Spriggs executed a written contract for the wholesale distribution of Coors beer.

6. Similar written contracts were subsequently executed by Coors and Spriggs on March 4, 1957, November 29, 1957, February 5, 1960, February 15, 1961, and April 10, 1963. Each of these successive written contracts made adjustments to Spriggs' territory.

7. The foregoing successive written agreements respectively defined for the period of each agreement the territories within which Spriggs was to distribute Coors beer in Los Angeles County, California.

8. The last written agreement between Spriggs and Coors was executed on April 10, 1963. This agreement

expressly provided that it superseded and made void all other prior agreements, verbal or written, between the parties thereto.

9. At all times relevant to this action, it has been Coors' marketing policy to achieve maximum market penetration. Coors carries out this marketing policy by continually testing population growths and shifts, checking the issuance and withdrawals of licenses to sell alcoholic beverages in designated areas, and examining the ability of its distributors to provide good service for existing and potential licensees in designated areas. Coors from time to time adjusts the territories within which its distributors market so as to accomplish maximum market penetration.

10. The sale and distribution of beer involves delicate public policy questions and since the repeal of prohibition has involved extensive state regulation in California. Coors, and the public, have a valid interest in assurance that distributors will comply with the law, regulations and publicly accepted standards of propriety. This can be accomplished in an effective way only by absolute designation of responsibility under territorial guidelines.

11. Beer is a perishable food commodity in contrast to consumer hard goods. Coors beer is even more perishable than other brands because it is brewed using an aseptic process. Coors maintains a program of quality control of its products which requires refrigeration of beer while en route to its distributors and thereafter while warehoused by its distributors, continuous rotation of stock, and at least weekly, regular and speedy delivery by distributors to all retailers within the distributors' territories in insulated or refrigerated delivery vehicles.

The imposition of territorial limitations is the only method by which Coors could readily identify a distributor that was not following the prescribed method of quality control in its distribution of Coors beer. That is only one part of the quality control which Coors maintains in the brewing and distribution of its beer.

12. The public has a right to the widest availability of Coors beer. The imposition of territorial limitations, and the marketing requirement that each Coors distributor provide full service to each retailer within its territory, prevents the distributor from concentrating on the easier large accounts. Coors and the public have an interest in requiring full service for both large and small retailers by each of the Coors distributors in Los Angeles County.

13. Coors' imposition of territorial restrictions on its distributors in Los Angeles County had no restraining effect on interbrand competition.

14. There is no evidence that the people of Los Angeles County would have benefited from intrabrand competition and there is evidence to the contrary.

15. Although other Coors distributors in Los Angeles County accepted similar territorial limitations imposed upon them by Coors, there was no evidence of collusion by the other Coors distributors in Los Angeles County.

16. The "relevant period" as sometimes referred to in these findings of fact is the four years preceding the filing of the cross-complaint on Ortober 18, 1965.

17. Upon the sale of Coors beer to the wholesale beer distributor at Golden, Colorado, Coors parted with dominion over the beer and transferred title and risk of loss to the wholesale distributor.

18. The foregoing findings of fact, to the extent they may be considered conclusions of law, are to be considered conclusions of law.

CONCLUSIONS OF LAW

From the foregoing facts, the court concludes:

1. The April 10, 1963, written contract between the parties operated to supersede and terminate all other verbal and written agreements between the parties, and as of its date constituted the only agreement between the parties.

2. Spriggs has standing to sue under Section 16750 (a) of the Business and Professions Code.

3. The territorial limitation imposed by Coors upon Spriggs by the terms of the April 10, 1963, agreement was a vertical restraint.

4. The territorial limitation imposed by Coors upon Spriggs by the terms of the April 10, 1963, agreement did not *per se* violate the Cartwright Act.

5. There was no horizontal combination in violation of the Cartwright Act.

6. Coors is not bound by the doctrine of collateral estoppel on the issue of the illegality of territorial restraints by reason of the decisions in *Adolph Coors Co. v. FTC*, 497 F.2d 1178 (10th Cir. 1974), *Copper Liquor Inc. v. Adolph Coors Company*, 506 F.2d 934 (5th Cir. 1975), or *Adolph Coors Co. v. A. & S. Wholesalers, Inc.*, 1975 Trade Cas. ¶ 60,187 (D. Colo.).

7. The decision in *Spriggs v. Coors*, 37 C.A.3d 633, is not dispositive of the issue of the legality of territorial limitations by Coors.

8. The imposition of territorial restrictions by Coors on its distributors in Los Angeles County was reasonable and therefore lawful under the Cartwright Act.

9. Coors has a legitimate need to insure quality control, and no alternative or less restrictive method than vertical territorial limitation could achieve the same result.

10. Coors and the public are interested in assuring that Coors distributors comply with the extensive state regulation of the distribution and sale of beer in California. Vertical territorial restrictions insure accountability with this regulation by absolute designation of responsibility for each sales territory.

11. The California Legislature, by adopting in 1972 Section 25000.5 of the Business and Professions Code, expressed a public policy that requires territorial restraints in wholesale beer distribution.

12. The foregoing conclusions of law, to the extent they may be considered findings of fact, are true and are to be considered findings of fact.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 15, 1977.

/s/ LESTER E. OLSON
Judge of the Superior Court

Judgment After Trial by Court.

Superior Court of the State of California for the County of Los Angeles, No. 869 998.

Filed April 15, 1977.

[Caption Omitted in Printing]

This cause came on regularly for trial on November 15, 1976, in Department 31 of the above-entitled Court, the Honorable Lester E. Olson, Judge, presiding, sitting without a jury, a jury having been duly waived by both parties.

Pursuant to stipulation of the parties, the Court ordered that the cause be bifurcated and said trial proceeded initially only on the question of whether cross-defendant Adolph Coors Company violated the Cartwright Act by committing a *per se* violation thereof, and further on the question of whether the cross-defendant's conduct, if not a *per se* violation of the Cartwright Act, violated said Act by imposing an unreasonable restraint in violation of the judicially declared "Rule of Reason."

Cross-complainants appearing by attorneys Richard A. Del Guercio and Thomas Elke and cross-defendant appearing by its attorneys G. William Shea, Richard F. Seiden and Leo N. Bradley, and evidence both oral and documentary having been presented by both parties and the cause having been argued and submitted for decision and the Court having made and caused to be filed its written Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED that cross-complainants Ralph E. Spriggs, Phoebe Spriggs and R. E. Spriggs Co., take nothing by the

third cause of action of their cross-complaint from cross-defendant Adolph Coors Company and that cross-defendant have and recover from cross-complainants its taxable costs and disbursements in the amount of $1,618.93.

Dated: April 15, 1977.

/s/ Lester E. Olson
Judge of the Superior Court

Coors' Brief as Respondent in the California Court of Appeal.

* * *

The *Schwinn* territorial per se violation argument is *not* now urged upon this Court on this appeal even though it was the basis on which the case was tried. Why not? Because between the time of Judge Olson's decision against Spriggs and the filing of Spriggs' opening brief on this appeal, the United States Supreme Court expressly overruled *Schwinn* in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

* * *

Spriggs concludes its references to testimony by citing R.T. 357 and 358. This citation, which purports to show a relationship between prices and the territorial limits in its distributorship, ignores the testimony of Mr. Coors in replying to Judge Olson's question:

> "I think we can get at it this way: Sir, having in mind your testimony concerning the policy of Coors during the period in question concerning pricing, did your company impose territorial lines with respect to distributorships for the purpose of carrying out its pricing policy?
>
> "THE WITNESS: I don't see the connection, Your Honor. I think I would have to answer that in the negative." (R.T. 356, line 26-357, line 4.)

* * *

The president of Coors and Mr. De Nio, the former ABC enforcement officer, also testified that territorial limitations were essential to ensure compliance with federal and state law. (R.T. 329, line 26-330, line 23, 513. line 27-515, line 17.) The trial court deter-

mined that during the relevant period "absolute designation of responsibility under territorial guidelines" was the only effective way to assure compliance with "the extensive state regulation of the distribution and sale of beer in California." (C.T. 262, lines 9-16, 265, lines 9-13.)

In *GTE Sylvania, supra,* the United States Supreme Court recognized that, although vertical restrictions reduce intrabrand competition, they "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." 433 U.S. at 54. The Court further noted that vertical territorial restrictions are becoming increasingly essential to ensure compliance with obligations imposed by federal and state law. 433 U.S. at 55 n.23, *citing, e.g., Tripoli Co. v. Wella Corp.,* 425 F.2d 932 (3d Cir. 1970); Cal. Civ. Code § 1790 *et seq.*

* * *

The two cases which Spriggs relies upon are *Copper Liquor Inc. v. Adolph Coors Co.* and *Adolph Coors Co. v. F.T.C.* (O.B. 8.) One quick way to show the irrelevancy of those cases is to point out that each of them applied the now defunct *Schwinn* rule. Other distinctions were that the activity there involved was of a different nature and for a different time span than in this case.

These differences convinced Judge Olson that Coors was not collaterally estopped:

> "The Court finds that Coors is not bound by the doctrine of collateral estoppel by reason of the decisions in *FTC, Copper Liquor* and A & S.
>
> "The doctrine of collateral estoppel cannot be used to require a court to apply inappropriate

> law or appellate decision. The real thrust of Spriggs' argument on collateral estoppel is to require application of the *per se* approach. As indicated above, such conclusion cannot be reached by this Court.
>
> "Secondly, the three cases relied upon by Spriggs did not involve a determination of completely identical issues."
>
> (Notice of Intended Decision p. 4, Augmented Record.)

The trial court's decision is supported by precedents relied upon by Spriggs as well as other authorities.

In *Bernard v. Bank of America,* 19 Cal. 2d 807, 122 P.2d 892 (1942), the California Supreme Court held that the doctrine of collateral estoppel does not apply unless the issue presented is identical to the issue decided in the prior adjudication. 19 Cal. 2d at 813. In *Chern v. Bank of America,* 15 Cal. 3d 866, 127 Cal. Rptr. 110, 544 P.2d 1310 (1976), the Court recently elaborated that where the subsequent action involves parallel facts but a different historical transaction, the application of the law to the facts is not subject to collateral estoppel. 15 Cal. 3d at 871-72. If there is any uncertainty that the precise question was raised and determined in the prior suit, there can be no collateral estoppel. *Eichler Homes, Inc. v. Anderson,* 9 Cal. App. 3d 224, 234, 87 Cal. Rptr. 893 (1970).

* * *

Applying *Louis Stores, Inc.* and *Cochran, supra,* to the case at bar, the doctrine of collateral estoppel should not be applied to Coors because Coors would suffer an unfair competitive disadvantage with respect

to other brewers. Coors, which was a party to the *Copper* and *FTC* cases, would be bound by the defunct *Schwinn* doctrine while other brewers would be free to justify their territorial restrictions under the rule of reason. Thus, the application of estoppel in this case would result in injustice.

* * *

Coors' Post Hearing Letter Dated February 1, 1979.

Clerk
California Court of Appeal
Second Appellate District
3580 Wilshire Boulevard, Room 301
Los Angeles, CA 90010

R. E. Spriggs Co., Inc. et al. v.
Adolph Coors Co., 2nd Civil No. 52115

Dear Sir:

This is in response to appellants' letter dated January 31, 1979, enclosing a copy of the opinion in *Parklane Hosiery Co., Inc. v. Shore,* 47 U.S.L.W. 4079 (1979).

In *Parklane* the Court applied the doctrine of collateral estoppel to facts determined by a court in a judicial proceeding. That distinguishes it from the administrative determination in *Adolph Coors Co. v. FTC,* 497 F.2d 1178 (10th Cir. 1974). The Court in *Parklane* states that different procedures in the second action, such as full scale discovery, may make offensive estoppel unfair. 47 U.S.L.W. at 4082 & n.15.

Very truly yours,

McCUTCHEN, BLACK, VERLEGER & SHEA
G. WILLIAM SHEA
JUDD L. JORDAN

BRADLEY, CAMPBELL & CARNEY
LEO N. BRADLEY
By ....
Judd L. Jordan
Attorneys for Respondent
Adolph Coors Company

JLJ:js

cc: Demetriou & Del Guercio
Honorable Lester E. Olson

Coors' Post Hearing Letter Dated March 9, 1979.

HAND DELIVERED

Clerk
California Court of Appeal for the
Second Appellate District
3580 Wilshire Boulevard, Room 301
Los Angeles, CA 90010

R. E. Spriggs Co., Inc. et al. v.
Adolph Coors Co., 2nd Civil No. 52115
Division Five

Dear Sir:

Enclosed is a copy of the February 6, 1979, decision of the United States Court of Appeals, Fifth Circuit, in the case of *Del Rio Distributing, Inc. v. Adolph Coors Company*. The principal significance of this decision is that the court rejected the same collateral estoppel argument based upon the cases of *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975), relied upon by the appellant in the case before the Court.

Respectfully,

McCUTCHEN, BLACK, VERLEGER & SHEA
G. WILLIAM SHEA
JUDD L. JORDAN

BRADLEY, CAMPBELL & CARNEY
LEO N. BRADLEY

By..
G. William Shea
Attorneys for Respondent
Adolph Coors Company

cc: Demetriou & Del Guercio
Honorable Lester E. Olson
(with enclosure to each)

GWS:js

Opinion.

R. E. Spriggs Company, Inc., et al., Cross-complainants and Appellants, v. Adolph Coors Company, Cross-defendant and Respondent.

[Civ. No. 52115. Second Dist., Div. Five. June 26, 1979.]

KAUS, P. J.—R. E. Spriggs Co., Inc., appeals from a judgment on its cross-complaint in favor of cross-defendant Adolph Coors Company.

Adolph Coors Company (Coors) is a Colorado corporation. It manufactures, brews, and bottles beer only in Golden, Colorado, and sells it, f.o.b. Golden, to wholesale distributors in eleven western states, including California.

Appellant R. E. Spriggs Co., Inc. (Spriggs) owned and operated a wholesale distributorship in Los Angeles, California. Spriggs distributed Coors' products from 1937 until its termination in 1964. The written distribution agreements between Coors and its distributors, including Spriggs, designated the territory within which each could distribute Coors beer.

On Spriggs' termination, Coors sought injunctive relief against Spriggs' continued sales. Spriggs cross-complained in October 1965, alleging a combination in restraint of trade, and seeking damages under the Cartwright Act. (Bus. & Prof. Code, § 16700 et seq.) In the parties' joint pretrial statement—the controlling document before the court—Spriggs contended that during the relevant years preceding October 1965 the Coors-Spriggs written agreements violated the act "by reason of the territorial limitations therein, *and because the control afforded to Coors by such agreements in combination with other agreements between Coors and Spriggs resulted in illegal price fixing,*" and, further, that such agreements "resulted in territorial limitations, *price fixing* and conspiracy to exclude Spriggs from selling beer in Los Angeles County, all in violation of the Cartwright Act." (Our italics.)

Initially, the trial court dismissed for lack of jurisdiction, reasoning that since all relevant activities involved interstate commerce the supremacy clause of the United States Constitution and the Sherman Antitrust Act precluded application of the Cartwright Act to the factual situation. This court reversed and remanded, finding no preemption. (*R. E. Spriggs Co. v. Adolph Coors Co.* (1974) 37 Cal.App.3d 653 [112 Cal.Rptr. 585].)

Later, the trial court, pursuant to stipulation by the parties, ordered the cause bifurcated and proceeded initially only on the question whether Coors had violated the act.

FACTS

During the trial Spriggs established the economic dominance of Coors in its relationship with its distributors. A Coors' distributorship was a valuable but fragile asset, terminable without cause on 30 days' notice. Coors had a waiting list of about 7000 applicants for a total of 167 distributorships. Clearly the situation was tailored for Coors' wishes to become the distributors' commands.

As noted, each distributorship contract contained strict territorial restrictions which Coors defended in the name of efficiency in distribution, quality control and so forth. Admittedly, however, the territorial restrictions totally eliminated intrabrand competition at the wholesale level. Further, it is quite clear from the record that they made it easier for Coors to monitor both wholesale and retail prices. Coors maintained a

staff of field representatives whose business it was to keep check on the distributors: one of their specific duties was to report distributors' price changes—up or down—to Coors.

The matter of prices charged at the wholesale and retail levels was admittedly vital to Coors. A policy memorandum distributed after the period in question, but admitted to be relevant at all times, contained the following instructions to its distributors: "In order to maintain a successful wholesale or retail business, pricing integrity is essential. Pricing integrity will result in adequate and equitable profit to both Distributor and retailer and is fair to the ultimate consumer.

"It is the policy of the Adolph Coors Company to suggest, if it so chooses, to either the wholesaler or retailer level, suggested minimum pricing. We reserve the right to further that policy by simply refusing to deal with anyone who doesn't adhere to said policy.

"The Adolph Coors Company and its agents must only state the policy. They cannot make agreements, threaten, coerce or intimidate wholesalers or retailers in any manner. They can enforce the policy only by reserving the right to refuse to deal with those who don't adhere to the suggested prices."[1]

While this pricing policy memorandum speaks only of minimum pricing, the record indicates that Coors was not just interested in minimum pricing, but in price fixing, period. Thus, its president and chairman

[1]This last paragraph was obviously a self-serving statement that Coors would not stray beyond the rule of *United States v. Colgate & Co.* (1919) 250 U.S. 300, 307 [63 L.Ed. 992, 997, 39 S.Ct. 465, 7 A.L.R. 443] that a manufacturer may "exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

of the board testified that if wholesale prices could not be kept down, the company would not survive. Both wholesale and retail profit margins were "suggested" at such levels that both the distributor and the retailer got a "fair return" if they ran a "tight ship." Coors' philosophy was that it was in partnership with the distributors and retailers and if any one of the three partners got out of step "the castle [would] come tumbling down." According to this witness Coors' pricing policy was enforced by its representatives who went around to the distributors to discuss wholesale prices with them. They made suggestions as to such prices and attempted to persuade the distributors to follow them. When a distributor had too high a markup Coors "strongly" suggested that he do something about it. Low markups were, however, equally frowned on. According to one Barnhardt, Coors' vice president of sales, Coors did not permit any rebates or discounts. "Everything is on a one-price basis. We do not appreciate our distributors rebating or discounting in any fashion. We think that that is an undesirable part of marketing."

Barnhardt left little doubt that Coors' efforts at persuasion were successful, at least with those distributors who wanted to stay in the "partnership." Asked whether it was his experience that the distributors normally complied with Coors' policies, he replied: "'*It is our experience that all of those that are still representing us do comply with our policies. We feel that way or they wouldn't be representing us.*" (Italics added.)

Barnhardt also testified that Coors' California distributors complied with the beer price posting provisions of section 25000 of the Business and Professions Code

by having Coors post the prices at which distributors would sell.[2]

Eventually the trial court signed findings and conclusions. We summarize the highlights: 1. Compliance with various state laws could "be accomplished in an effective way only by absolute designation of responsibility under territorial guidelines." 2. Territorial limitations on distributorships were the only practicable way for insuring quality control. 3. Further, such territorial limitations and certain regulations which Coors enforced prevented distributors from servicing only the large, profitable accounts. Thus the system vindicated the public's "right to the widest availability of Coors beer." 4. The territorial limitations had no restraining effect on interbrand competition. 5. There was no evidence that the people of Los Angeles would have benefited from intrabrand competition and there was evidence to the contrary. 6. There was no collusion among Coors' distributors. 7. The territorial limitations were a vertical restraint but did not, per se, violate the Cartwright Act. 8. The territorial limitations were reasonable under the Cartwright Act in the light of Coors' legitimate need to insure quality control and compliance with all applicable state laws and regulations.

DISCUSSION

The most obviously meritorious contention of Spriggs' is that the trial court failed to make any finding "on the issue of price maintenance as a part of the territorial restraint." Although Spriggs submitted about four pages

[2]This answer was soon corrected so that the witness' final testimony was that Coors merely "recommended" the price posted by the distributors.

of proposed finding on that issue,[3] the court's findings simply ignore it. Coors does not deny this, but insists that for two different reasons it does not really matter.

First—though second in sequence of argument—Coors claims that no finding on the issue was necessary because "Spriggs produced no evidence at the trial of such price fixing. . . ." We think that we have shown that this is simply not so. Under the total circumstances of this case Coors simply cannot find refuge in the *Colgate* doctrine (see fn. 1, *supra*). Coors' ireas about proper prices at the wholesale and retail level may only have been couched in terms of suggestions, but having in mind Coors' relative economic clout, particularly its power to cancel valuable distributor franchises almost at will, it seems clear that there is evidence that Coors engaged in price maintenance through suggestions which the distributors could not refuse. (Cf., *United States v. Parke, Davis & Co.* (1960) 362 U.S. 29, 44 [4 L.Ed.2d 505, 515, 80 S.Ct. 503]: "When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act.")[4]

Coors' second justification for the trial court's failure to make a finding on price maintenance is couched in terms of impossibility: "The trial court could not have made a finding that there were illegal price controls

[3]As noted earlier, the issue was clearly within the framework of issues to be tried according to the joint pretrial statement.

[4]The parties as well as this court have proceeded on the assumption that "federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act." (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 925 [130 Cal.Rptr. 1, 549 P.2d 833].)

in view of the ABC law which expressly permitted such controls."

There are several reasons why the point is specious. Coors refers, of course, to what is now subdivision (i) of section 24755 of the Business and Professions Code.[5] That subdivision in effect provides for optional maintenance of minimum retail prices of beer. It does not apply here first, because Coors has never sought to comply with the provisions of section 24755 e.g., the filing of price schedules;[6] second, because the statute only applies to retail prices; and third, because the statute only permits the fixing of minimum prices. As our recital of facts has demonstrated, there was evidence that Coors was not just interested in minimum prices—no discounts or rebates—but rather in prices as such, fixed by it and determined by its view of an appropriate profit margin if a distributor ran a "tight ship." This type of price control goes far beyond anything which section 24755 permits.[7]

[5]The entire section was held unconstitutional in *Rice v. Alcoholic Bev. etc. Appeals Bd.* (1978) 21 Cal.3d 431 [146 Cal.Rptr. 585, 579 P.2d 476]. This holding was triggered by the federal Consumer Goods Pricing Act of 1975 (89 Stat. 801) and is not otherwise relevant to this appeal.

[6]Section 24755 which in effect amounted to a nonsigner fair trade law (*Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1215, 1220 [81 Cal.Rptr. 251, 459 P.2d 667]) must be distinguished from price-posting under Business and Professions Code section 25000.

[7]There can be no question that in a proper case the Sherman Act applies to combinations to lower prices. (See *Kiefer-Stewart Co. v. Seagram & Sons* (1951) 340 U.S. 211, 213 [95 L.Ed. 219, 223, 71 S.Ct. 259].) Under the Cartwright Act the picture is more confused. The prohibited restrains on competition are set forth in overlapping detail in section 16720 of the Business and Professions Code. When enacted in 1907, subdivision (b) of section 16720 defined a "trust" in part as a combination to "increase or reduce" prices. The words "or reduce" were perhaps eliminated by section 1 of chapter 362 of the

Coors also points to a 1972 statute—passed seven years after the relevant period—section 25000.5 of the Business and Professions Code, which compels beer manufacturers to designate territorial limits of wholesalers and prohibits a wholesaler from filing price schedules under Business and Professions Code section 25000 (see fn. 2, *supra*) unless he has entered into and filed a written agreement outlining his territory.

Frankly we have no information as to just what considerations triggered this statute. Presumably, however, it was intended to change the law (*Union League Club v. Johnson* (1941) 18 Cal.2d 275, 278-279 [115 P.2d 425]) and not to ratify Coors' practice. In any event, the statute does not permit the assigning of territories as a means of price fixing.

Spriggs' second point relates to its claim that Coors is collaterally estopped by the findings in *Copper Liquor Inc. v. Adolph Coors Co.* (5th Cir. 1975) 506 F.2d 934 and *Adolph Coors Company, v. F.T.C.* (10th Cir. 1974) 497 F.2d 1178 [30 A.L.R.Fed. 1] (cert. den. 419 U.S. 1105 [42 L.Ed.2d 801, 95 S.Ct. 775]).

Statutes of 1909, but the Legislature seems to have had some doubts on that score for the second paragraph of Business and Professions Code section 16701, enacted in 1941, reads as follows: "If the words 'or reduce' (following the word 'increase') were not effectively deleted from Subdivision 2 of Section 1 of Chapter 530 of the Statutes of 1907 by Section 1 of Chapter 362 of the Statutes of 1909, a combination of capital, skill or acts by two or more persons for the purpose of reducing the price of merchandise or of any commodity is a trust."

This strange statutory history is irrelevant, however, since price fixing is prohibited by several other subdivisions of section 16720. For example in *Mailand v. Burckle* (1977) 20 Cal.3d 367, 377-378 [143 Cal.Rptr. 1, 572 P.2d 1142], the Supreme Court said of a certain agreement that "this agreement constituted 'acts by two or more persons' to fix or establish the price of a commodity within the meaning of section 16720, *subdivision (d)* . . ." (Italics added. See also subdivision (c)(4).)

If Spriggs is correct, the trial court's findings will need drastic revision.

At trial, Spriggs introduced evidence that the distributorship contracts involved in *F.T.C.* and *Copper Liquor* were identical in substance to the Spriggs/Coors agreements and that Coors' manner of enforcement thereof—including its attempts at persuading distributors to adhere to its pricing policies—was consistent throughout the relevant period.

Copper Liquor involved a retail liquor store owner who brought an action under section 1 of the Sherman Act (15 U.S.C. § 1), alleging that Coors conspired or combined with its distributors to fix the retail price of its beer and to create and enforce exclusive territories. A verdict for plaintiff was sustained by the Court of Appeal which found that "[t]he restrictions Coors imposed [upon its distributors] necessarily facilitated price fixing," that "[a] jury could reasonably conclude . . . that the territorial restrictions have as much to do with Coors's [*sic*] attempts to maintain wholesale and retail price levels as with its concern with maintaining the quality of its beer" and that the territorial restrictions "were ancillary to an illegal price fixing scheme." (506 F.2d at pp. 946, 947, 948.)

In *F.T.C.* the commission had found massive evidence of price fixing in findings quoted below[8] and upheld

by the Court of Appeals. It then found that Coors vigorously enforced its territorial restrictions and that, in view of the unlawful price fixing, there were "[s]trong grounds for presuming that the most injurious effects of vertical territorial divisions may be operative, and, therefore, for holding the entire arrangement of territories with price fixing illegal per se." (*Id.*, at p. 1186.)

Unquestionably, *Copper Liquor* and *F.T.C.* decided, *as factual matters,* that Coors' territorial restraints were ancillary to a price fixing scheme. This makes irrelevant Coors' principal point that both *F.T.C.* and *Copper Liquor* were based upon the now defunct doctrine of *United States v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365, 379 [18 L.Ed.2d 1249, 1260, 87 S.Ct. 1856], that under certain circumstances territorial restrictions alone were illegal per se. *Schwinn* was, of course, overruled in *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) 433 U.S. 36, 57-58 [53 L.Ed.2d 568, 584-585, 97 S.Ct. 2549], but the legal demise of the *Schwinn* rule is beside the point. What we are interested in—and what the trial court should have been interested in—are the factual findings of *F.T.C.* and *Copper Liquor* that the territorial restrictions were ancillary to an illegal price fixing scheme. Price fixing, of course, has been illegal per se for decades and still is. (See

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[8]". . . . [Coors] has pursued a policy of fixing, controlling and maintaining prices at which Coors beer is sold at both the wholesale and retail level, that in furtherance of this policy it has engaged in various acts and practices such as: suggested resale prices to both distributors and retailers, checking prices at which distributors and retailers sell Coors beer, advising distributors and retailers that it is contrary to Coors pricing policy for them to deviate from prices approved by respondent, threatening to terminate distributorships and threatening to force distributors to sell their businesses for refusing to adhere to suggested retail prices, entering into agreements and understandings with distributors as to the wholesale prices which the distributors will charge for Coors beer, joining with distributors in attempting to coerce retailers to refrain from selling Coors beer at prices below those approved by respondent, encouraging distributors to prevent retail price cutting by refusing to deliver Coors beer to price cutters, or to reduce the amount of beer delivered, and entering into agreements and understandings with retailers as to the retail prices or range of prices at which such retailers will sell Coors beer." (497 F.2d 1178, at pp. 1185-1186.)

e.g., *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773 [44 L.Ed.2d 572, 95 S.Ct. 2004]; *United States v. General Motors Corp.* (1966) 384 U.S. 127, 147 [16 L.Ed.2d 415, 427, 86 S.Ct. 1321] and cases cited therein.)

The cases cited by Coors (*Chern v. Bank of America* (1976) 15 Cal.3d 866 [127 Cal.Rptr. 110, 544 P.2d 1310], *Louis Stores, Inc. v. Dept. of Alcoholic Beverage Control* (1962) 57 Cal.2d 749 [22 Cal.Rptr. 14, 371 P.2d 758], *Cochran v. Union Lumber Company* (1972) 26 Cal.App.3d 423 [102 Cal.Rptr. 632] and *Eichler Homes, Inc. v. Anderson* (1970) 9 Cal.App.3d 224 [87 Cal.Rptr. 893]) really support Spriggs. *Chern, Cochran* and *Louis Stores* all concerned the issue of whether a question of law actually litigated and determined by a final and valid judgment may be asserted under the doctrine of collateral estoppel. In *Chern*, for instance, although the court rejected the claim, it noted, "a principal issue in the instant case is essentially a legal one. . . . No material dispute exists concerning the relevant facts in the present case. In contrast, the estoppel cases relied on by defendant, including *Bernhard* [v. *Bank of America* (1942) 19 Cal.2d 807, 813 (122 P.2d 892)], involved attempts to relitigate *factual* issues arising out of the same subject matter of transaction as the prior suit. The difference is significant." (Italics in original; *id.*, p. 872.) This was but an echo of *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 [123 Cal.Rptr. 1, 537 P.2d 1250]: "The res judicata effect of the prior determination between the parties of a question of *law* may differ from the effect of such prior determination of a question of *fact*." (Italics in original; *id.*, at p. 230.) Similarly, in *Cochran*,

appellant's claim was denied because injustice would result if patently erroneous conclusions of law were given estoppel effect. And in *Eichler* the court refused to apply the doctrine only because "the issue of the case before us cannot reasonably be said to be identical to that which was litigated and determined [in the prior action]." (9 Cal.App.3d at p. 234.) As noted above, the issues involved in this case are precisely those litigated and decided in *FTC* and *Copper*.

Coors concedes, as it must, that *Bernhard* permits a stranger to assert the doctrine defensively, as a shield. It argues, however, that we should not extend the doctrine to encompass offensive use as well. Under the circumstances, we disagree.

Use of collateral estoppel as a sword is not novel. (See *Vanguard Recording Society v. Fantasy Records Inc.*, (1972) 24 Cal.App.3d 410]100 Cal.Rptr. 826]; 4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, § 243.) Moreover, as aptly pointed out by Spriggs' counsel, the offensive—defensive distinction is an anachronism no longer deserving of judicial recognition. (5) This point is succinctly made in *O'Connor v. O'Leary* (1967) 247 Cal.App.2d 646, at pages 649-650 [56 Cal.Rptr. 1): "We are of the opinion that application of the doctrine of collateral estoppel, absent the element of mutuality, is not dependent upon whether it is asserted offensively or defensively, but upon whether, under the particular circumstances at hand, policy considerations restrict its use. Generally, the objective of res judicata and its affiliate collateral estoppel, is to prevent 'vexatious litigation with its attendant expense both to the parties and the public.' [Citation.] Where this objective will not be aided by application of these doctrines, and assertion thereof would 'defeat

the ends of justice or important considerations of policy,' they may not be invoked. [Citations.]"

We perceive none of the pernicious policy objections enumerated in *O'Conner* to beset our application of the doctrine in the case before us. This is not one of a set of cases maintained by different persons in separate negligence actions for personal injuries against a single defendant, the most common area in which assertion of the doctrine has been denied. (See *Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762 [327 P.2d 111].) Nor is it a case where application of the doctrine will work an obvious injustice upon Coors' interests.[9] To be sure, application of the doctrine effectively bars Coors' chances of obtaining a more favorable determination of the factual circumstances surrounding its distribution scheme than it did in *F. T. C.* and *Copper Liquor*. However, in litigating those cases Coors had two full opportunities to present its case, and inasmuch as it does not argue that it had insufficient reason to fully defend in either action we see no independent basis for a third try.[10] On the other hand, proper

[9]*McCook v. Standard Oil Co. of California* (C.D.Cal. 1975) 393 F.Supp. 256 cited by Coors, fails to suggest otherwise. There, the court carved a "small exception" into the offensive use of the doctrine where the defendant had had no right to a jury trial in the first action and the plaintiff, not a party to the first, equitable action, sought to use the equitable decree as a legal sword. The case before us presents no such circumstances.

[10]Justice White's opinion in *Blonder-Tongue v. University Foundation* (1971) 402 U.S. 313, 328 [28 L.Ed.2d 788, 799, 91 S.Ct. 1434], is incisive: "The cases and authorities discussed above connect erosion of the mutuality requirement to the goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases. The courts have often discarded the rule while commenting on crowded dockets and long delays preceding trial. Authorities differ on whether the public interest in efficient judicial adminis-

application of the doctrine furthers judicial economy in an overly litigious society, insures against the possibility of inconsistent results, and comports with our notions of fair play and substantial justice.

The most recent case on the issue decided by th United States Supreme Court is *Parklane Hosiery Co. v. Shore* (1979) .... U.S. .... [58 L.Ed.2d 552, 99 S.Ct. ....], where the court discusses at great length the difference between collateral estoppel as a sword and as a shield and finally decides on the approach of the Restatement Second of Judgments (Tent. Draft No. 2, 1975) section 88, which allows for broad discre-

tration is a sufficient ground in and of itself for abandoning mutuality, but it is clear that more than crowded dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue. The question in these terms includes as part of the calculus the effect on judicial administration, but it also encompasses the concern exemplified by Bentham's reference to the gaming table in his attack on the principle of mutuality of estoppel. In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table of 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.' *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185 (1952). Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." [Fn. omitted.]

tion in the application of collateral estoppel as an offensive weapon. (*Id.*, p. — [58 L.Ed.2d at p. —]) The criteria under which such determinations are to be made are fully set forth in the tentative draft referred to and to repeat them here would be an exercise in redundancy.[11] Suffice it to say that for the reasons stated we see no unfairness in denying Coors' a third opportunity to litigate the legality of territorial restrictions designed as part of a price fixing scheme.

In sum, we hold that the trial court erred in failing to find as a matter of law that the factual circumstances surrounding Coors' imposition of territorial restraints upon Spriggs were determined in *F. T. C.* and *Copper Liquor,* and that Coors' was barred from relitigating in this case the question whether it imposed territorial restraints upon Spriggs in order to facilitate a price fixing scheme.

The judgment must therefore be reversed. While the first error discussed—failure to find on the issue of price fixing—would, at most, call for a retrial on the issue of liability, the preclusive effect of *F. T. C.* and *Copper Liquor* leaves only the question of damages to be resolved.

The judgment is reversed with directions to make findings on the issue of liability consistent with this opinion and to try the issue of damages.

Stephens, J., and Hastings, J., concurred.

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[11]Section 88 refers and incorporates criteria set forth in section 68.1 of the Tentative Draft. We have considered both sections.

Coors' Petition for Rehearing in the California Court of Appeal.

ARGUMENT

Preliminary Statement

The opinion of the Court filed on June 26, 1979 in this case (*Spriggs II*) improperly applies the doctrine of collateral estoppel to judgments that did not involve identical issues of fact. Conclusive application of the doctrine to deny Coors its day in court on the issue of liability is contrary to applicable state and federal law and constitutes a denial of due process guaranteed by the Fourteenth Amendment and Article I, section 7 of the California Constitution.

The opinion of the Court also conspicuously ignores the recent opinion of the United States Court of Appeals for the Fifth Circuit in *Del Rio Distributing, Inc. v. Adolph Coors Co.*, 589 F.2d 176 (5th Cir. 1979), *petition for cert. filed,* No. 78-1876, 47 U.S.L.W. 3826 (June 18, 1979), which expressly refuses to apply the doctrine of collateral estoppel based on *Adolph Coors Co. v. FTC*, 497 F.2d 1178 (10th Cir. 1974) (*FTC*), or on its own decision in *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) (*Copper Liquor*). It is ironic and symptomatic of this Court's opinion that a California court should give conclusive collateral effect to the *Copper Liquor* judgment when the court that decided *Copper Liquor* has refused to give it that effect.

The Court's opinion reversing the trial court's judgment rests entirely upon an unprecedented extension of collateral estoppel. *It imposes liability upon Coors without trial.*

* * *

The rehearing should be granted on any of the following grounds:

1. The Court's opinion improperly extends the legal principle of collateral estoppel. It sanctions the use of this legal doctrine not as a sword but as a spear flung from other jurisdictions to deny Coors a trial in the courts of the State of California on the issue of liability.

2. In so extending the doctrine of collateral estoppel, the Court is denying Coors due process under Article I § 7 of the California Constitution and the Fourteenth Amendment of the United States Constitution.

* * *

In the instant case application of collateral estoppel is improper because *Copper Liquor v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975), clearly involved different conduct in a different state at a different time, and *Adolph Coors Co. v. FTC*, 497 F.2d 1178 (10th Cir. 1974), (which relied to a great degree upon the testimony of the plaintiff in *Copper Liquor*), did not clearly involve identical factual issues, as required by Bernhard and *Eichler, supra.*

A. *COPPER LIQUOR* INVOLVED DIFFERENT CONDUCT IN A DIFFERENT STATE AT A DIFFERENT TIME AT A DIFFERENT LEVEL OF DISTRIBUTION

The first trial in this case in 1971 determined that Spriggs was properly terminated as a Coors distributor on September 22, 1965. *See R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 656, 112 Cal. Rptr. 585 (1974) (*Spriggs I*). After the second trial in 1976, the trial court specifically found that

> "[t]he 'relevant period' as sometimes referred to in these findings of fact is the four years preceding the filing of the cross-complaint on October 18, 1965."
>
> Finding of Fact 16, C.T. 263.

In *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975), the plaintiff was a retailer named Letcher who did not acquire his store until 1966:

> Letcher acquired a sole proprietorship in the Brownwood store in January of 1966. About the same time, Coors entered the Brownwood market."
>
> 506 F.2d at 939.

Thus, *Copper Liquor* clearly involved a different time period.

Moreover, the relevant geographic market in *Copper Liquor* had been designated as "the market for beer in Brownwood, Texas." 506 F.2d at 950. There was no question that the relevant geographic market in this case was the market for beer in Los Angeles County, California. *See, e.g.,* Findings of Fact 3, 4, 7, 13, 14, 15, Conclusions of Law 8, 10, 11, C.T. 260-65. The *Copper Liquor* judgment concerning events in Brownwood, Texas after January 1, 1966 is not relevant evidence of events in Los Angeles County, California prior to October 18, 1965.

* * *

Finally, the plaintiff in *Copper Liquor* was a *retailer* who claimed that Coors refused to deliver beer to him because he was selling Coors below his own cost:

> "Letcher advertised Coors at less than his own cost, using it as a loss leader."
>
> 506 F.2d at 939.

Copper Liquor thus involved a retailer selling Coors as a loss leader to attract other business. Such conduct by a Coors distributor in California would be both suicidal and illegal. In *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal. 3d 431, 146 Cal. Rptr. 585, 579 P.2d 476 (1978), the California Supreme Court recently noted that California law expressly prohibits the sale of any product as a "loss leader."

> "Finally, we find persuasive the argument that there are other means to achieve the fundamental goals of the price maintenance laws without running afoul of the Sherman Act. *Thus, our laws prohibit the sale of any product as a 'loss leader' (Bus. & Prof. Code § 17044)* and licensees may not offer any gift or premium in connection with the sale of alcohol (§ 25600)."
>
> 21 Cal. 3d at 458 (emphasis added).

B. *FTC* DID NOT INVOLVE CLEARLY IDENTICAL ISSUES OF FACT AND THERE IS NO REFERENCE IN *FTC* TO LOS ANGELES COUNTY AT ANY TIME PERIOD, RELEVANT OR OTHERWISE, OR TO *SPRIGGS*

In *Adolph Coors Co. v. FTC,* 497 F.2d 1178 (10th Cir. 1974), the Court of Appeals and Federal Trade Commission both relied very heavily upon the testimony of Mr. Letcher, the plaintiff in *Copper Liquor, supra:*

> "Mr. Letcher, a retailer, testified that he was selling Coors at special weekend prices and that he was warned by the Coors distributor to discontinue the practice. Letcher refused to cooperate and the distributor terminated deliveries to his store. The distributor told Letcher that deliveries

> would be received if he would agree not to discount the beer and that Letcher might lose the retail account if he continued to discount the beer. Letcher was also told by the distributor that Coors does not tolerate price cutting. Letcher sold his business. The distributor resumed deliveries to the new owners who agreed not to discount the beer. The distributor did not act independently in cutting off Letcher as Coors suggests, but cut him off in accordance with Coors' pricing policies."
>
> 497 F.2d at 1185.

As discussed above, Coors dealings with Letcher clearly involved different conduct in a different state at a different time and at a different level of distribution from Spriggs.

Moreover, the *FTC* opinion affirmed an equitable decree operating *prospectively* from July 24, 1973. 497 F.2d at 1181-82 n.2. Especially in view of *FTC's* reliance on the testimony of the plaintiff in *Copper Liquor, supra,* it is far from certain that *FTC* involved identical conduct at an identical time and place. In the absence of certainty that *FTC* involved identical issues of fact, application of collateral estoppel is clearly improper under *Bernhard* and *Eichler, supra.* Indeed, the only references to activities of Coors in California in *FTC* were to the Oakland and Sacramento areas; there is no reference to any conduct of Coor in Los Angeles County at any time period, relevant or otherwise, and no reference to Spriggs.

Both the process by which the FTC comes to its conclusions embodied in an order and the limited judicial review of that order point out the lack of factual identity required for collateral estoppel. As

stated in *Lee National Corp. v. Atlantic Richfield Co.*, 308 F. Supp. 1041 (E.D. Pa. 1970):

> "In such Federal Trade Commission proceedings the function of the Court is somewhat limited in its review of administrative proceedings. Moreover, such proceedings contemplate, not an antitrust action or a treble damage action, as here, but rather the discovery of 'unfair methods of competition', by 'an administrative body of practical men' for the purpose of eradicating business 'evils' in an early or incipient stage. The Court's inquiry is concerned with the order of the Commission; whether it acted within the scope of the authority vested in it; whether there was 'warrant in the record' for its findings and conclusions; whether there is a 'reasonable basis in law' for its order with particular reference, in some instances, to the reasonableness of the remedy reflected in the order. *Language used by the Court in thus reviewing a Commission's order may not be taken out of context and used as the basis for a summary judgment in proceedings of a different nature such as a private treble damage action.'*
> 308 F. Supp. 1047.

The foregoing was quoted approvingly in *Belliston v. Texaco, Inc.*, 455 F.2d 175, 183 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), the Circuit that affirmed the order in *FTC*.

Finally, the judgment of the Court of Appeals affirming the equitable decree in *FTC* determined only that there was substantial evidence to support the findings of the administrative agency, and did not determine

that Coors had violated the antitrust laws. 497 F.2d at 1184-86.

* * *

C. *DEL RIO* EXPRESSLY REJECTS APPLICATION OF COLLATERAL ESTOPPEL BASED ON *COPPER LIQUOR* OR *FTC*

The United States Court of Appeals for the Fifth Circuit, the court that decided *Copper Liquor*, recently refused to give collateral estoppel effect to that decision in *Del Rio Distributing, Inc. v. Adolph Coors Co., supra*. The decision in the *Del Rio* case was called to this Court's attention in Coors' post-hearing letter dated March 9, 1979. The plaintiff in *Del Rio* had been a Coors distributor from December 1966 until its termination by Coors on December 1, 1971. Del Rio sued alleging violations of the antitrust laws by Coors by means of "fixing of wholesale and retail prices and the limiting of territories where Coors beer could be resold." 589 F.2d at 177.

Following an adverse jury verdict and denial of motions for new trial or judgment n.o.v., Del Rio appealed and raised the argument that *Copper Liquor* and *FTC* should be given collateral estoppel effect.

> "Del Rio contends that adverse judgments entered against Coors in *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) serve as collateral estoppel on the issue of liability. We disagree and find several bases for distinguishing those cases. One of the most obvious distinctions of *Copper Liquor* is that it was decided under the per se rule of *Schwinn* that has now been replaced by the rule of reason under *Sylvania*.

"The F.T.C. case, decided in another circuit, was based on an appeal of an F.T.C. cease and desist order brought under § 5 of the Federal Trade Commission Act. The Federal Trade Commission had overturned the decision of an administrative law judge who had found no violation of the act. In reaching its decision on vertically imposed territorial restrictions, the Tenth Circuit was compelled to rely on law in effect at that time; the *Schwinn* per se rule.

"In light of the reliance on *Schwinn* in both *Copper Liquor* and the F.T.C. case we hold that the doctrine of collateral estoppel has no application in the instant case."

589 F.2d at 179. (Footnote omitted.)

In *Spriggs II* this Court has concluded that collateral estoppel can be given both defensive and offensive effect, analogizing it to both a sword and a shield. However, the correct analogy is that collateral estoppel has become in *Spriggs II* an erratic spear, which cannot be thrown forward in time from Brownwood, Texas to Del Rio, Texas, but which has the mysterious power to travel backward in time from Brownwood, Texas clear to Los Angeles, California.

II.

A JUDGMENT AFFIRMING AN FTC ORDER UNDER SECTION 5 OF THE FTC ACT IS NOT ADMISSIBLE IN PRIVATE SUITS

An order affirming a decree under section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45, which is much broader than the Clayton and Sherman Acts, is not a judgment "under the antitrust laws" under section 5(a) of the Clayton Act, 15 U.S.C.A.

§ 16(a) and is not admissible in a private treble damages action. *See North Carolina v. Chas. Pfizer & Co., Inc.*, 537 F.2d 67 (4th Cir.), *cert. denied,* 429 U.S. 870 (1976); *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346 (3d Cir. 1964), *aff'd on other grounds,* 381 U.S. 311 (1965); *In re Antibiotic Antitrust Action,* 333 F. Supp. 317 (S.D.N.Y. 1971); *Proper v. John Bene & Sons, Inc.*, 295 F. 729 (E.D.N.Y. 1923). If it is not clear whether an FTC order was issued under the antitrust laws or under the FTC Act, the order is not admissible in a private antitrust suit. *See Y. & Y. Popcorn Supply Co. v. A.B.C. Vending Corp.*, 263 F. Supp. 709 (E.D. Pa. 1967).

In *North Carolina v. Chas. Pfizer & Co., Inc., supra,* for example, the Fourth Circuit emphasized that the FTC complaint under § 5(a) of the FTC Act "was an administrative proceeding, not a judicial trial," which is a distinction of such magnitude as to prevent its use for estoppel purposes. 537 F.2d at 74. First, the Court declared the difference between the FTC Act of the antitrust laws is such that:

"The issue before the Commission was whether the respondents in that proceeding were guilty of unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act which is a regulatory statute much broader in its scope than the Clayton and Sherman Acts under which the present litigation was instituted."

537 F.2d at 74.

Second, the Court observed that the rules of procedure varied drastically, as did the consequences:

"The Commission did not require that the alleged fraud on the Patent Office be demonstrated by

clear and convincing evidence and employed evidentiary and procedural rules much more lenient than those incident to a judicial trial. * * *

" 'The Federal Trade Commission is regulatory in nature; the Sherman Act is penal as well as civil; the consequences flowing from each Act are quite dissimilar. The proceedings themselves and the rules governing them and the legal principles applicable to each are distinct.' "

537 F.2d at 74, *quoting United States v. Chas. Pfizer & Co.*, 205 F. Supp. 94, 96 (S.D.N.Y. 1962).

Third, the Fourth Circuit observed, "by the very terms of the Federal Trade Commission Act, proceedings under section 5 appear to be incompatible with the doctrine of collateral estoppel." 537 F.2d at 74. Noting that section 5(e) of the FTC Act, 15 U.S.C. § 45(e), did not permit FTC orders to absolve any "person, partnership or corporation from any liability under the Antitrust Acts," the Fourth Circuit declared:

"It would be strangely unfair to permit the Government to litigate under the Sherman or Clayton Acts an issue earlier decided against it in a Section 5 proceeding, and at the same time deny to a respondent the right to defend on the same issues in a subsequent antitrust suit brought by a plaintiff who was not even a party to the administrative proceeding."

537 F.2d at 74.

Finally, the Fourth Circuit noted that § 5(a) of the Clayton Act, 15 U.S.C. § 16(a), limited final judgments or decrees under the Antitrust laws to only

prima facie evidence in subsequent proceedings. Concluded the Court:

". . . it would be paradoxical to accord a Section 5 administrative proceeding the absoute effect of collateral estoppel when a court determination in a criminal action that a defendant had violated the Sherman Act is limited to only prima facie effect."

537 F.2d at 74.

In the instant case, the *FTC* judgment is not admissible because it merely affirmed an order under section 5 of the FTC Act. 497 F.2d at 1180.

Section 5(a) of the Clayton Act, 15 U.S.C.A. § 16(a), provides that judgments in actions brought by the United States under the Sherman Act (but not the FTC Act) create at most a rebuttable presumption. *E.g., Purex Corp. v. Procter & Gamble Co.*, 453 F.2d 288, 291 (9th Cir. 1971), *cert. denied,* 405 U.S. 1065 (1972) ("takes no question of fact from either court or jury . . . [n]or does it in anywise work a denial of due process of law.") *See Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 690 (1961) (Clayton Act § 5 "definitive legislative pronouncement that a government suit cannot be preclusive of private litigation").

* * *

In response a question from the trial court, Mr. Coors testified specifically that *during the period in question,* territories were not imposed for the purpose of carrying at pricing policy:

"I think we can get at it this way: Sir, having in mind your testimony concerning the policy of Coors during the period in question concerning

pricing, did your comany impose territorial lines with respect to distributorships for the purpose of carrying out its pricing policy?

"THE WITNESS: I don't see the connection, Your Honor. I think I would have to answer that in the negative."

R.T. 356-57.

* * *

As the Court has acknowledged, "failure to find on the issue of price-fixing—would, at most, call for a retrial on the issue of liability. . . ."

Slip op. at 22.

CONCLUSION

Conclusive application of the doctrine of collateral estoppel on the basis of judgments not involving identical facts to preclude Coors from a trial on the issue of liability is contrary to federal and state law and constitutes a denial of due process. Coors therefore petitions this Court to grant a rehearing for the reasons stated.

* * *

Modification* of Opinion (94 Cal.App.3d 419, — Cal. Rptr. —) on Denial of Petition for Rehearing.

R. E. Spriggs Company, Inc., et al., Cross-complainants and Appellants, v. Adolph Coors Company, Cross-defendant and Respondent.

THE COURT.—It is ordered that the opinion filed herein on June 26, 1979, be modified in the following particulars:

At the end of the last full paragraph on page 22 [94 Cal.App.3d 419, 431, advance report, end of the 2d full par.] after the word "scheme" add as footnote 12, the following:

"[12]Coors points out that in *Del Rio Distributing, Inc. v. Adolph Coors Co.* (5th Cir. 1979) 589 F.2d 176, 178 (petition for cert. filed, No. 78-1876, June 18, 1979), a panel of the very court which decided *Copper Liquor* upheld a trial court's refusal to give the *F.T.C.* and *Copper Liquor* judgments preclusive effect, reasoning that it would be inappropriate to do so once *Schwinn* had been overruled. Frankly, we are not persuaded by that court's narrow legal view of the doctrine of collateral estoppel, even though we think that Coors was bound by the same court's factual determination that Coors' territorial restrictions were 'ancillary to an illegal price fixing scheme.'"

The petition for a rehearing is denied.

*This modification requires the movement of text affecting pages 431-432 of the bound volume report.

Coors' Petition for Hearing in the Supreme Court of California.

To the Honorable Rose E. Bird, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Respondent Adolph Coors Company ("Coors") petitions this Honorable Court to grant a hearing to consider the decision of the Court of Appeal of the State of California, Second Appellate District, Division Five filed on June 26, 1979 (*Spriggs II*), reversing the judgment of the trial court in favor of Coors with directions to make findings on the issue of liability against Coors and to try only the issue of damages.

Grounds for Hearing.

The Court of Appeal in its opinion in *Spriggs II* expands the doctrine of collateral estoppel in a novel and unprecedented fashion and a hearing in this Court is necessary to secure settlement of the following important questions of law concerning the application of collateral estoppel in general and specifically in cases arising under the antitrust laws of California and the United States:

1. Whether judgments that do not involve identical issues may be applied under the doctrine of collateral estoppel to deny a defendant a trial on the issue of liability.

Coors contends that application of collateral estoppel on the basis of judgments involving fact issues that are clearly not identical to the fact issues in this case

is contrary to prior appellate decisions, including the opinion of this Court in *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942), and that use of collateral estoppel to determine the issue of liability on a different set of facts constitutes a denial of due process under the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the California Constitution.

2. Whether a judgment under section 5 of the Federal Trade Commission Act, 15 U.S.C.A. §45, may be admitted as *conclusive* evidence on the issue of liability in a private treble damages action under the Cartwright Act, Cal. Bus. & Prof. Code §§16700-16758.

Coors contends that, under section 5(a) of the Clayton Act, 15 U.S.C.A. §16(a), judgments under section 5 of the Federal Trade Commission Act, 15 U.S.C.A. §45, are not only to be used for collateral estoppel; such judgments are not even admissible in private treble damages actions.

A further ground for hearing by this Court is the conflict between the *Spriggs II* decision by Division Five of the Court of Appeal, Second Appellate District and the *La Fortune* decision by Division Two of the same court.

A petition for rehearing by the court of appeal raising these issues was denied on July 23, 1979. A copy of the opinion of the court of appeal and its order denying rehearing are attached as an appendix to this Petition.

Statement of the Case.

The fourteen year history of this case follows the birth of the *Schwinn* doctrine in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 765 (1967), its death in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and its resurrection in *Spriggs II:*

(1) In 1965, Coors successfully sued to enjoin Spriggs from selling Coors beer after Coors had lawfully terminated Spriggs as a distributor in Los Angeles County. Spriggs attempted to file a cross-complaint to which Coors successfully demurred.

(2) In 1967 the United States Supreme Court decided *Schwinn*, holding that territorial limitations are per se violations of the Sherman Act.

(3) Within months of the *Schwinn* decision, Spriggs filed a fourth amended cross-complaint alleging in its third cause of action that territorial limitations in its wholesale distributor agreements with Coors violated the Cartwright Act.

(4) At the first trial in 1971, the trial court determined that Spriggs had been properly terminated and dismissed the third cause of action *sua sponte* for lack of jurisdiction.

(5) In *Fortune v. Ebie*, 26 Cal.App.3d 72, 102 Cal.Rptr. 588 (1972), Division Two of the Second Appellate District held that the *Schwinn* per se rule did not apply to vertical territorial restrictions under the Cartwright Act.

(6) In *R. E. Spriggs & Co. v. Adolph Coors Co.*, 37 Cal.App.3d 653, 112 Cal.Rptr. 585 (1974) (*Spriggs I*), Division Five of the Second Appellate District held that the trial court had erred in dismissing the third cause of action of the fourth amended cross-complaint for lack of jurisdiction.

(7) In *Adolph Coors Co. v. FTC*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (*FTC*), a Federal Trade Commission order prospectively enjoining Coors from certain marketing practices was affirmed and in *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) (*Copper Liquor*), a jury verdict holding Coors liable for treble damages under the Sherman Act was affirmed. Both courts expressly relied on the *Schwinn* doctrine and did so with apparent reluctance. Indeed, the Tenth Circuit in FTC specifically stated that the application of *Schwinn* to the facts before it appeared unreasonable and suggested that the United States Supreme Court should grant a hearing in the *FTC* case and consider "grafting an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason."

(8) At the second *Spriggs* trial in 1976, the trial court bifurcated liability from damages and proceeded to determine that Coors had not violated the Cartwright Act, refusing, under *La Fortune*, to apply the doctrine of collateral estoppel to *Copper Liquor* and *FTC*.

(9) In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the United States Supreme Court expressly overruled *Schwinn*, noting that the Tenth Circuit in *FTC* had expressly urged the Court to "consider the need for greater flexibility."

(10) In *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977), the Tenth Circuit held that Coors' territorial limitations were not illegal *per se*, expressly refusing to follow its own decision in *FTC* because *Schwinn* had been overruled by *Sylvania*.

(11) In *Del Rio Distributing, Inc. v. Adolph Coors Co.*, 589 F.2d 176 (5th Cir. 1979), *petition for cert. filed*, No. 78-1876, 47 U.S.L.W. 3826 (June 18, 1979), the Fifth Circuit held that Coors' territorial limitations were not illegal *per se* and that the doctrine of collateral estoppel could not be applied to its own decision in *Copper Liquor* or to the decision of the Tenth Circuit in *FTC* because *Schwinn* had been overruled by *Sylvania.*

(12) In *Spriggs II*, Division Five of the Second Appellate District held that Coors was collaterally estopped by *Copper Liquor* and *FTC* on the issue of liability and remanded for a trial only on the issue of damages.

ARGUMENT.

I.

The Court of Appeal Uses the FTC and Copper Liquor Decisions, Which Did Not Involve Identical Issues, to Collaterally Estop Coors From a Trial on Liability, Thus Denying Coors Due Process of Law Under the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the California Constitution.

Spriggs II imposes liability on Coors without trial in the California courts on that issue. This denial of due process to Coors rests solely upon erroneous application of collateral estoppel based on two judgments from other jurisdictions which did not involve identical issues.

This is directly contrary to the decision of this Court in *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942), where the Court said that the doctrine of *res judicata* or collateral estoppel must

> "conform to the mandate of due process of law that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard." 19 Cal.2d at 811.

Accordingly, the Court held in *Bernhard* that before collateral estoppel may be applied, there must be an affirmative answer to the following question:

> "Was the issue decided in the prior adjudication *identical* with the one presented in the action in question?" 19 Cal.2d at 813 (emphasis added).

If there is any uncertainty that the precise factual issue was raised and determined in the prior adjudication, there can be no collateral estoppel:

"But from any view it must be agreed that the identity of issues of the two cases is far from clear. If 'anything is left to conjecture as to what was necessarily involved and decided' there can be no collateral estoppel (*Talman v. Talman,* 229 Cal.App.2d 39, 42 [39 Cal.Rptr. 863]; *Stout v. Pearson, supra,* 180 Cal.App.2d 211, 216; *Blumenthal v. Maryland Cas. Co.,* 119 Cal.App. 563 566-567 [6 P.2d 965]); '" 'Every estoppel must be certain to every intent and not to be taken by argument or inference' "' (*Stout v. Pearson, supra,* at p. 216). And as said in *Graves v. Hebbron,* 125 Cal. 400, 406 [58 P. 12], 'it must appear . . . that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject matter of the action will be at large and open to new contention, . . .' "

Eichler Homes, Inc. v. Anderson, 9 Cal.App.3d 224, 234, 87 Cal.Rptr. 893 (1970).

Specifically, an antitrust judgment not expressly dealing with the same time and place has no estoppel effect in a subsequent private treble damages action:

"The findings in a government antitrust judgment or decree have an estoppel effect in a subsequent treble damage action only as to the time and place of the unlawful activity expressly dealt with in the prior decree. Essentially, this means that a finding that the defendant has violated the law in some particular geographical area during a specific period will not serve as proof that he acted unlawfully in the same manner in a different area or at another time."

16 J. von Kalinowski, Antitrust Laws and Trade Regulation §111.02[3] at 111-25-26 (1978).

In *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.,* 346 U.S. 537 (1954), for example, the United States Supreme Court expressly held:

"The trial judge instructed, in effect, that the *Paramount* decrees alone could not support a recovery by petitioner; additional evidence was required to relate the presumed *Paramount* conspiracy to Baltimore and to the claimed damage period. The reasons for this are clear. The *Paramount* decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres; yet such a conspiracy is the nub of plaintiff's claim. The *Paramount* case involved a conspiracy found to exist as of 1945, which was enjoined no later than June 25, 1948, but the conspiracy alleged here involves a claimed damage period running from February 1949 to March 1950. Indeed, the relevancy of *Paramount* to the instant case is slight. We need not pass on respondents' contention that petitioner was entitled to no benefit at all from the earlier decrees. We merely hold that petitioner was entitled to no greater benefit than the trial judge gave it." 346 U.S. at 543-44 (footnote omitted).

In the instant case application of collateral estoppel is improper because *Copper Liquor* clearly involved different conduct in a different state at a different time, and *FTC,* (which relied to a great degree upon the testimony of the plaintiff in *Copper Liquor*), did not involve clearly identical issues, as required by *Bernhard* and *Eichler.* In *Del Rio Distributing, Inc. v. Adolph Coors Co.* and *Adolph Coors Co. v. A & S*

Wholesalers, Inc. the courts deciding *Copper Liquor* and *FTC* expressly refused to apply collateral estoppel to those judgments.

A. Copper Liquor Involved Different Conduct in a Different State at a Different Time at a Different Level of Distribution.

The first trial in this case in 1971 determined that Spriggs was properly terminated as a Coors distributor on September 22, 1965. *See R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal.App.3d 653, 656, 112 Cal.Rptr. 585 (1974) *(Spriggs I)*. After the second trial in 1976, the trial court specifically found that

> "[t]he 'relevant period' as sometimes referred to in these findings of fact is the four years preceding the filing of the cross-complaint on October 18, 1965." Finding of Fact 16, C.T. 263.

In *Copper Liquor* the plaintiff was a retailer named Letcher in Brownwood, Texas, who did not acquire his store until 1966:

> "Letcher acquired a sole proprietorship in the Brownwood store in January of 1966. About the same time, Coors entered the Brownwood market." 506 F.2d at 939.

Thus, *Copper Liquor* clearly involved a different time period.

Moreover, the relevant geographic market in *Copper Liquor* had been designated as "the market for beer in Brownwood, Texas." 506 F.2d at 950. There was no question that the relevant geographic market in this case was the market for beer in Los Angeles County, California. *See, e.g.,* Findings of Fact 3, 4, 7, 13, 14, 15, Conclusions of Law 8, 10, 11, C.T. 260-65. The *Copper Liquor* judgment concerning events

in Brownwood, Texas after January 1, 1966 is not relevant evidence of events in Los Angeles County, California prior to October 18, 1965.

> "A judgment addressing itself to acts or practices committed in a defined geographical area is not admissible in an action in which the plaintiff is alleging unlawful activities elsewhere."
>
> 16 J. von Kalinowski, Antitrust Laws and Trade Regulation §111.02[3] at 111-27-28 (1978).
>
> *See, e.g., State of Michigan v. Morton Salt Co.*, 259 F.Supp. 35, 73-75 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. State of Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967).

Finally, the plaintiff in *Copper Liquor* was a *retailer* who claimed that Coors refused to deliver beer to him because he was selling Coors below his own cost:

> "Letcher advertised Coors at less than his own cost, using it as a 'loss leader'." 506 F.2d at 939.

Copper Liquor thus involved a *retailer* selling Coors as a loss leader to attract other business. Such conduct by an exclusive Coors *distributor* in California such as Spriggs would be both suicidal and illegal. In *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal. 3d 431, 579 P.2d 476, 146 Cal.Rptr. 585 (1978), this Court recently noted that California law expressly prohibits the sale of any product as a "loss leader."

> "Finally, we find persuasive the argument that there are other means to achieve the fundamental goals of the price maintenance laws without running afoul of the Sherman Act. *Thus, our laws prohibit the sale of any product as a 'loss leader'*

(*Bus. & Prof. Code* §17044) and licensees may not offer any gift or premium in connection with the sale of alcohol (§25600)." 21 Cal.3d at 458 (emphasis added).

B. FTC Did Not Involve Clearly Identical Issues of Fact and There Is No Reference in FTC to Los Angeles County at Any Time Period, Relevant or Otherwise, or to Spriggs.

In *FTC*, the Court of Appeals and Federal Trade Commission both relied very heavily upon the testimony of Mr. Letcher, the plaintiff in *Copper Liquor. See* 497 F.2d at 1185. As discussed above, Coors' dealings with Letcher clearly involved different conduct in a different state at a different time and at a different level of distribution from Spriggs.

Moreover, the *FTC* opinion affirmed an equitable decree operating *prospectively* from July 24, 1973. 497 F.2d at 1181-82 n.2. Especially in view of *FTC*'s reliance on the testimony of the plaintiff in *Copper Liquor, supra*, it is clear that *FTC* did not involve identical conduct at an identical time and place to the conduct, time and place involved in this case. Because *FTC* did not involve identical issues of fact, application of collateral estoppel is clearly improper under *Bernhard* and *Eichler, supra*. Indeed, the only references in *FTC* to activities of Coors in California were to the Oakland and Sacramento areas; there is no reference to any conduct of Coors in Los Angeles County at any time period, relevant or otherwise, and no reference to Spriggs. Coors had neither the opportunity nor the purpose in *Copper Liquor* and *FTC* to litigate the issues in *Spriggs II*. Nevertheless, the Court of Appeal states that Coors

> ". . . had two full opportunities to present its case, and inasmuch as it does not argue that it had insufficient reason to fully defend in either action we see no independent basis for a third try." Appendix pp. 13-14.

Finally, the judgment of the Tenth Circuit Court of Appeals affirming the equitable decree in *FTC* determined only that there was substantial evidence to support the findings of the administrative agency, and did not determine that Coors had violated the antitrust laws. 497 F.2d at 1184-86. The *FTC* decree itself, of course, is not *res judicata* in California courts. *See, e.g., Empire Star Mines Co. v. California Employment Comm'n*, 28 Cal.2d 33, 48, 168 P.2d 686 (1946); *Pratt v. Local 683*, 260 Cal.App.2d 545, 562, 67 Cal.Rptr. 483 (1968).

C. Spriggs II Is Contrary to Del Rio, A & S, La Fortune and Sylvania.

The United States Court of Appeals for the Fifth Circuit, the court that decided *Copper Liquor*, recently refused to give collateral estoppel effect to that decision in *Del Rio Distributing, Inc. v. Adolph Coors Co., supra*. The plaintiff in *Del Rio* had been a Coors distributor until its termination by Coors. Del Rio sued alleging violations of the antitrust laws by Coors by means of "fixing of wholesale and retail prices and the limiting of territories where Coors beer could be resold." 589 F.2d at 177.

Following an adverse jury verdict and denial of motions for new trial or judgment n.o.v., Del Rio appealed and raised the argument that *Copper Liquor* and *FTC* should be given collateral estoppel effect.

> Del Rio contends that adverse judgments entered against Coors in *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th

Cir. 1974), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) serve as collateral estoppel on the issue of liability. We disagree and find several bases for distinguishing those cases. One of the most obvious distinctions of *Copper Liquor* is that it was decided under the per se rule of *Schwinn* that has now been replaced by the rule of reason under *Sylvania.*

"The F.T.C. case, decided in another circuit, was based on an appeal of an F.T.C. cease and desist order brought under § 5 of the Federal Trade Commission Act. The Federal Trade Commission had overturned the decision of an administrative law judge who had found no violation of the act. In reaching its decision on vertically imposed territorial restrictions, the Tenth Circuit was compelled to rely on law in effect at that time; the *Schwinn* per se rule.

"In light of the reliance on *Schwinn* in both *Copper Liquor* and the F.T.C. case we hold that the doctrine of collateral estoppel has no application in the instant case." 589 F.2d at 179 (footnote omitted).

In its order denying a rehearing in *Spriggs II,* the Court of Appeal compounded its error in its treatment of *Del Rio* by expressly declining to follow the Fifth Circuit's analysis of its own decision. In interpreting a Federal case, a state court should give that Federal decision the same effect as the Federal court gave it. *E.g., Levy v. Cohen,* 19 Cal.3d 165, 173, 561 P.2d 252, 137 Cal.Rptr. 162, *cert. denied,* 434 U.S. 833 (1977); *Bank of America v. McLaughlin etc. Co.*, 40 Cal.App.2d 620, 626, 105 P.2d 607 (1940).

Similarly, in *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977), the Tenth Circuit expressly refused to follow its own decision in *FTC,* stating that it was "firmly anchored" to *Schwinn,* which was overruled in *Sylvania:*

"We see no merit in this contention [for a directed verdict under *FTC*] inasmuch as it relies almost exclusively on the same predicate discussed in (1) above: 'A & S was entitled . . . to have the jury informed that the vigorously enforced territorial restrictions of Coors was a *per se* violation of the Sherman Act and that all that they had to determine was the fact and amount of damages.' [Brief of A & S, Appellant, Cross-Appellee, p. 23.] The Supreme Court decision in *Continental T.V., Inc. v. GTE Sylvania, Incorporated, supra,* disposes of this issue adversely to A & S." 561 F.2d at 811-12.

In *La Fortune v. Ebie,* Division Two of the same Second Appellate District held that vertical territorial limitations may be justified under the rule of reason:

"It is possible that relevant factual distinctions between the food service industry and the bicycle industry in *Schwinn* may justify exclusivity of territory for delivery of product. For example, speed of delivery, quality of product, and condition of product at time of delivery may be factors which under the rule of reason could justify restraints of trade that would be unreasonable in the marketing of a standardized manufactured appliance." 26 Cal.App.3d at 75-76.

Finally, in *Continental T.V., Inc. v. GTE Sylvania Inc.* the United States Supreme Court expressly over-

ruled *Schwinn,* holding that vertical territorial restrictions may be justified by marketing efficiency and the need to comply with federal and state law.

In the instant case, the trial court specifically found that Coors' territorial restrictions were necessary and reasonable for the reasons stated in *La Fortune* and *Sylvania.* These findings received only ridicule in *Spriggs II*:

> "Eventually the trial court signed findings and conclusions. We summarize the highlights: 1. Compliance with various state laws could 'be accomplished in an effective way only by absolute designation of responsibility under territorial guidelines.' 2. Territorial limitations on distributorships were the only practicable way for insuring quality control. 3. Further, such territorial limitations and certain regulations which Coors enforced prevented distributors from servicing only the large, profitable accounts. Thus the system vindicated the public's 'right to the widest availability of Coors beer.' 4. The territorial limitations had no restraining effect on interbrand competition. 5. There was no evidence that the people of Los Angeles would have benefited from intrabrand competition and there was evidence to the contrary. 6. There was no collusion among Coors' distributors. 7. The territorial limitations were a vertical restraint but did not, per se, violate the Cartwright Act. 8. The territorial limitations were reasonable under the Cartwright Act in the light of Coors' legitimate need to insure quality control and compliance with all applicable state laws and regulations." Appendix pp. 5-6. *See* Findings of Fact 9-15, Conclusions of Law 4-11, C.T. 261-65.

These "highlights" dismissed by the Court of Appeal in *Spriggs II* are precisely the reasons that Coors' territorial limitations are justified under *La Fortune* and *Sylvania.*

II.

A Judgment Affirming an FTC Order Under Section 5 of the FTC Act Is Not Admissible as Conclusive Evidence in a Private Treble Damages Action.

Spriggs II holds that the FTC order in the *FTC* case is conclusive against Coors. This is not the law. Such an order is made under section 5 of the Federal Trade Commission Act, 15 U.S.C.A. §45, which is much broader than the Clayton and Sherman Acts. It is not a judgment "under the antitrust laws" under section 5(a) of the Clayton Act, 15 U.S.C.A. §16(a) and therefore is not admissible in a private treble damages action. *See North Carolina v. Chas. Pfizer & Co., Inc.,* 537 F.2d 67 (4th Cir.), *cert. denied,* 429 U.S. 870 (1976); *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.,* 332 F.2d 346 (3d Cir. 1964), *aff'd on other grounds,* 381 U.S. 311 (1965); *In re Antibiotic Antitrust Action,* 333 F.Supp. 317 (S.D.N.Y. 1971); *Proper v. John Bene & Sons, Inc.,* 295 F.729 (E.D.N.Y. 1923).

In *North Carolina v. Chas. Pfizer & Co., Inc., supra,* for example, the Fourth Circuit held that collateral estoppel did not apply to a judgment under §5 of the FTC Act, which was "an administrative proceeding, not a judicial trial." 537 F.2d at 74. The Court declared the difference between the FTC Act and the antitrust laws:

> "The issue before the Commission was whether the respondents in that proceeding were guilty of unfair methods of competition in violation of

Section 5 of the Federal Trade Commission Act which is a regulatory statute much broader in its scope than the Clayton and Sherman Acts under which the present litigation was instituted.

* * *

"[B]y the very terms of the Federal Trade Commission Act, proceedings under section 5 appear to be incompatible with the doctrine of collateral estoppel." 537 F.2d at 74.

Conclusion.

Conclusive application of the doctrine of collateral estoppel on the basis of judgments not involving identical facts to preclude Coors from a trial on the issue of liability is (1) contrary to clearly established federal and state law and (2) the manner in which the Court of Appeal has invoked that doctrine in *Spriggs II* constitutes a denial of Coors' constitutional rights of due process. Coors therefore petitions this Court to grant a hearing to clearify important legal issues and to resolve the clear conflict in the same appellate district.

Dated: August 6, 1979.

Respectfully submitted,

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Franklin H. Wilson,
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Order.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

Sept. 6, 1979.

I have this day filed Order HEARING DENIED.

In re: 2 Civ. No. 52115 R.E. Spriggs Co., Inc. *vs.* Adolph Coors Company.

Respectfully,

G. E. BISHEL
Clerk